No. 76

A. T. GORDON, ET AL.,

Petitioners,

v.

GRANVILLE H. LANCE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, THE CALIFORNIA TEACHERS ASSOCIATION, IDAHO EDUCATION ASSOCIATION, IOWA STATE EDUCATION ASSOCIATION, THE KANSAS STATE EDUCATION ASSOCIATION, NEW HAMPSHIRE EDUCATION ASSOCIATION, NORTH DAKOTA EDUCATION ASSOCIATION, WASHINGTON EDUCATION ASSOCIATION AND ST. LOUIS SUBURBAN TEACHERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF POSITION OF RESPONDENTS

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IN THE SUPREME COURT OF THE UNITED STATES

No. 96

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INTEREST OF AMICI CURIAE

All parties have consented to the filing of this brief.[1]

The National Education Association of the United States (NEA) is an organization composed of more than one million professional educators. Founded in 1857, it was granted a corporate charter by special Act of Congress in 1906. Its purpose is to improve the character and advance the in-

[1] The consents of both parties have been filed, in accordance with Rule 42(2) of the Rules of this Court, with the Clerk of the Court.

terests of the teaching profession and to promote the cause of education in the United States. Accordingly, for more than a century it has worked to improve the quality of education and has striven to insure an essential means to that end—the adequate and equitable financing of public schools.

The Association's interest in the present case stems from the adverse impact on the quality of educational facilities and services that is caused by the extraordinary majority voting requirement imposed by the Constitution of West Virginia and similar provisions in other states with respect to school financing proposals. School districts subject to these requirements have been forced, among other things, to make capital expenditures with funds that should be used to meet current needs and to resort to unsatisfactory and uneconomical methods of financing capital improvements. Many districts, notably in impoverished areas of the nation and in rapidly growing areas at the fringes of urban population centers, have been compelled to forego for extended periods of time essential capital outlays for construction or renovation of buildings, together with the acquisition of needed equipment—desks, audio-visual apparatus, laboratory devices, buses, and the like. The case at bar proves the point. There have been no new schools built or major additions or improvements made to existing schools in the county involved in this suit, Roane County, West Virginia, since 1946.

From its perspective as the nation's largest association of professional educators, NEA is deeply concerned about such conditions in the public school system. A number of state and local associations affiliated with the National Education Association, some of which have initiated or are participating in litigation challenging supermajority requirements in their respective States (see p. 6, n. 4, *infra*), share this concern and have joined this brief. We urge that the "supermajority" voting requirements here in issue, which have brought about such thoroughly undesirable consequences, violate the Equal Protection Clause of the Fourteenth Amendment.

QUESTION PRESENTED

Whether the extraordinary voting requirements of Sections 1 and 8 of Article X of the West Virginia Constitution and statutes enacted pursuant to those provisions violate respondents' right to equal protection of the laws under the Fourteenth Amendment.

STATEMENT

This litigation is rooted in the repeated frustration of the desire of a majority of the voters in Roane County, West Virginia, to adopt tax and bond proposals which they deem essential to the provision of adequate public education in Roane County.

Roane County is one of the relatively poor counties of West Virginia and has long suffered from serious deficiencies in its educational plant and resources. Of the 55 counties in West Virginia, Roane County ranks 34th in taxable resources and 38th in per capita personal income. See App. A, Tables 1 & 2, *infra*. Its actual per pupil expenditure in the 1967-68 school year (the latest figures available to NEA) was $509.77, as contrasted with a figure of $795.50 in Hancock County (the highest in West Virginia), and national and West Virginia statewide averages of $680.00 and $564.13, respectively. (See App. A, Table 3, *infra*.) According to the allegations of the plaintiffs below, which are not contested, there have been no new schools constructed or major additions or improvements made to existing schools in the county since 1946. In consequence, the county's schools are not only old but also inadequate to the ever-growing needs of the times. An average of 31.2 pupils are assigned to each elementary school classroom and an average of 25.5 pupils to each secondary school classroom, compared with state averages of 28 and 23.6, respectively. But beyond this sort of statistical evidence of the inferiority of the Roane County Schools, an even more telling fact is that the State Fire Marshall and the State Superintendent of Schools have prohibited further use of portions of two of the county's major

schools because of serious fire hazards. Dangerous and makeshift conditions also exist in many other schools. (Appx. 6a, 31a.)

A variety of causes, of course, may be responsible for such a lamentable situation. Often the reason is the relative poverty of the school district coupled with an unwillingness of the *majority* of the voters to make special sacrifices to overcome that disability. But that is not the reason for Roane County's difficulties; the deficiencies in Roane County's schools result directly from the *extraordinary majority* voting requirements of Sections 1 and 8 of Article X of the West Virginia Constitution and implementing statutory provisions.

Section 1 of the West Virginia Constitution provides that tax rates may exceed stated limits only if they are submitted to the voters of the taxing unit affected and 60 percent of the voters favor the higher rates.[2] Section 8 provides that no county, city, school district, or municipal corporation may incur indebtedness exceeding 5 percent of the assessed value of the taxable property therein, and may incur indebtedness within that limitation only if the question is submitted to a popular vote at which 60 percent of the votes cast are in favor of incurring the indebtedness.[3]

Pursuant to these requirements, proposals to borrow money and levy taxes needed to cure some of the deficiencies in the Roane County schools have repeatedly been submitted to the voters of Roane County; and because of these

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[2]The limits, per $100 of value, are 50 cents on personal property used exclusively in agriculture; $1 on all other property owned, used, and occupied by the owner for residential purposes and upon farms; $1.50 on all other property situated outside of municipalities; and $2 on all other property situated within a municipality.

[3]Section 8 also provides that at the time any debt is incurred, provision must be made "for the collection of a direct annual tax . . . separate and apart from and in addition to all other taxes . . . sufficient to pay, annually, the interest on [the] debt, and the principal thereof," within 34 years.

requirements, they have repeatedly been defeated. Six such proposals were submitted to the voters between 1964 and 1968. All six proposals received a majority of affirmative votes. But none received the 60 percent favorable vote required by Sections 1 and 8 of Article X of the State Constitution. (App. 31a; see App. A, Table 4, *infra*.)

Most recently, on April 29, 1968, the Roane County Board of Education submitted two proposals to the voters. One was a proposal to issue bonds in the amount of $1,830,000 to alleviate the overcrowded condition of the classrooms and school facilities, to remove the fire hazards, to provide more adequate and modern facilities, and to meet the needs of disadvantaged children. The second was a proposal to lay tax levies exceeding the regular rates for a period of five years, the resulting income to be used in part for current expenditures of the school system and in part for capital improvements in the school plant. A majority of the votes cast favored each proposal. However, the Board of Education could not issue the bonds or levy the additional taxes because the favorable vote was not large enough to satisfy the State's extraordinary majority requirements. (Appx. 25a-26a.)

Respondents thereupon instituted the present actions in state court, claiming that the extraordinary majority requirements of Sections 1 and 8 and the implementing statutes violate respondents' rights under the Equal Protection Clause of the Fourteenth Amendment. Respondents requested the court to require the school board to issue the bonds and levy the taxes approved by the voters. The trial court declined to grant such relief, but the State Supreme Court of Appeals reversed. Its decision is now before this Court for review. (Appx. 26a-27a, 39a.)

The issue presented does not affect West Virginia alone, nor does the West Virginia litigation stand alone. Extraordinary majority requirements applicable to school bond and tax proposals exist, so far as we are able to determine, in 17 states. (See App. A, Table 5, *infra*.) These requirements

include a 55 percent requirement in Nebraska, a 66-2/3 percent requirement in California, Idaho, Kentucky, Missouri, New Hampshire, New York,and Texas, and a 60 percent requirement in the other states having such requirements. Since the decision below, two other state supreme courts have decided the question presented. In *Westbrook v. Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970) (App. B, *infra*), the California Supreme Court unanimously concluded that California's extraordinary majority requirement, applicable to local bond elections, was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. In *Bogert v. Kinzer*, 465 P.2d 639 (Idaho, 1970), the Idaho Supreme Court reached a contrary conclusion with respect to the Idaho requirement, one judge dissenting. We understand that a number of actions challenging similar requirements are pending in other States.[4] For reasons stated below, we submit that the West Virginia and California courts were correct, and the Idaho court in error.

SUMMARY OF ARGUMENT

It is incontestable that the West Virginia extraordinary majority requirements applicable to local tax and bond elections value "no" votes more than "yes" votes in determining the outcome of such elections. The question, there-

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[4]Pending actions include *Adams v. Ft. Madison Community School District*, No. 15178, pending (Iowa District Court of Lee County); *Gaudette, et al. v. Peterson, et al.*, (Civ. No. 3328), pending (E.D. Wash.); *Glaser v. Board of Education*, (Civ. No. 69 C 284 (2)), pending (E.D. Mo.); *Nelsen v. Evans, et al.*, (Civ. No. 8633), pending (W.D. Wash.); *Priesler, et al. v. Board of Education*, (Civ. No. 69 C 339 (1)), pending (E.D. Mo.); *Priesler v. Mayor of St Louis*, (Civ. No. 69 C 250 (1)), pending (E.D. Mo.); *Thurston v. Greco*, (No. 41444), pending (Wash. Supreme Court); *Tiews v. Timberlane Regional School District*, (No. 6103), pending (New Hampshire Supreme Court).

In *Brenner v. Kansas City School District*, ___ F. Supp. ___, 39 LW 2121-22 (W.D. Mo., 1970), a three-judge federal district court held that Missouri's extraordinary majority requirements for school tax levies and bond issues were not violative of the Equal Protection Clause.

fore, is whether that differentiated treatment is permissible under the Equal Protection Clause. It is not.

1. While departures from the principle of political equality and its corollary, majority rule, have occurred during the course of our history, see *Baker v. Carr*, 369 U.S. 186, 307-323 (1962) (Frankfurter, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 595-624 (1964) (Harlan, J., dissenting), our national commitment to this principle and its corollary goes back to the beginnings of the nation. Thus, the Declaration of Independence committed us to the "self-evident" proposition that "all men are created equal." To Jefferson, the author of the Declaration, majority rule was the "fundamental law" of "every society of individuals of equal rights." Letter to Baron von Humboldt, 1817, Jefferson, *Democracy* (Padover ed., 1939). And through, to be sure, the Constitution restricted majority rule in important and well known particulars, nevertheless its principal spokesmen were committed to values not different from Jefferson's in this regard. Thus, Hamilton, in *The Federalist*, No. 22, was of the view that a "fundamental maxim of republican government" required that "the sense of the majority should prevail" and that extraordinary majority requirements, which defeat majority rule, are likely to do serious injury to the public welfare. Lincoln's Gettysburg Address, the Equal Protection Clause of the Fourteenth Amendment, and the Fifteenth, Seventeenth and Nineteenth Amendments reaffirmed and strengthened our national commitment to political equality.

2. The West Virginia scheme is invalid under this Court's apportionment and districting decisions, which are premised upon the constitutional requirements of political equality and majority rule. In *Gray v. Sanders*, 372 U.S. 368 (1963), the Court held that "once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote," 372 U.S., at 380, noting that "the conception of political equality," from the Declaration of Independence to

the Nineteenth Amendment, "can mean only one thing—one person, one vote." In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court held that the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S., at 7-8; *Hadley v. Junior College District*, 397 U.S. 50, 52 (1970). In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held that because all citizens are entitled to an equal voice in their government, state legislative malapportionment is unconstitutional, approving previously stated views of Mr. Justice Black and Mr. Justice Douglas that schemes that weight or dilute the vote are unconstitutional. Moreover, Mr. Justice Stewart's opinions in *Gray* and in the apportionment cases indicated his agreement that "within a given constituency there can be room for but a single constitutional rule—one voter, one vote," and indicated further that apportionment schemes that systematically frustrate the "will of a majority" and that are beyond the power of a majority to alter violate the Equal Protection Clause.

The West Virginia scheme cannot stand under the principles applied in these decisions. The Court has held them to be applicable to local elections. *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior College District, supra.* Moreover, the premise of the apportionment decisions is that under the Constitution all citizens are entitled to an equal voice in their government. Therefore it does not matter whether the election of representatives is involved or an election in which the people exercise legislative powers themselves. In either event, "political equality . . . can mean only one thing—one person, one vote."

Nor does it matter that this case involves restrictions on majority rule applicable only to the levy of taxes and the issuance of bonds, rather than to a broader range of governmental decisions. The purpose of an election is immaterial, so far as the applicability of this Court's equal participation decisions is concerned. *Hadley v. Junior College District, supra.* Moreover, education—and the financing of edu-

cation—is the most important function of local government today. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Therefore, the governmental functions involved are sufficient to justify the conclusion that the principles applied in the apportionment decisions are applicable here. See *Hadley v. Junior College District, supra.*

Finally, West Virginia's extraordinary majority requirements are particularly censurable because they are contained in its Constitution and thus can be amended only with the approval of representatives of two-thirds of the people of the State. But it would make no difference if those provisions could be changed by a majority of the legislature. The sometimes difficult job of enlisting the support of a majority of a legislature, and the enormous job of enlisting the support of a majority of the people of a State, make statewide remedies irrelevant as a practical matter. Moreover, such remedies are irrelevant as a legal matter. "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a majority . . . ." *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964).

3. The West Virginia scheme is also invalid under this Court's decisions with respect to denials of the franchise, specifically, its decisions in *Carrington v. Rash*, 380 U.S. 89 (1965), and *Cipriano v. City of Houma*, 395 U.S. 701 (1969). In *Carrington*, the Court rejected a contention that it was permissible to exclude military servicemen from the franchise because, *e.g.*, they might be unwilling to "invest in the future of the area," holding that " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," 380 U.S., at 94. That conclusion was reaffirmed in *Cipriano*, 395 U.S., at 706. The instant case involves the other side of the coin—a measure that limits the value of some citizens' votes for fear that voters may be only too willing to "invest in the future of the area." That is equally impermissible. *Carrington* cannot be distinguished on the ground that it was a voter exclusion case, for statutes providing for weighted

voting—measures that give some voters only a part of a vote *vis-a-vis* other voters—do result in partial exclusions from the franchise. To illustrate the point, Texas could not save the laws held unconstitutional in *Carrington* by giving military personnel only two-thirds of a vote.

4. If they are not unconstitutional for reasons stated above, the West Virginia extraordinary majority requirements are unconstitutional because they are not necessary to promote a compelling state interest and indeed are not rationally founded upon any valid state purpose. "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting . . . ." *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). Measures that dilute or restrict the franchise can be sustained only if they are necessary to promote a compelling state interest. *Kramer v. Union School District*, 397 U.S. 621 (1969).

The inadequacy of alleged justifications for measures like West Virginia's is demonstrated first by this Court's decisions in *Kramer*, *Cipriano* and *Phoenix*. In those cases, the Court struck down restrictions on the franchise allegedly designed to protect the interests of property taxpayers, holding that such restrictions are not necessary to protect such interests.

Moreover, the only alleged state objectives advanced to justify measures like West Virginia's are clearly unsound as a matter of fact.

a. Petitioner suggests that such measures curb municipal extravagance and thus contribute to financial "integrity." Studies show, however, that institutional factors in the bond market and requirements insuring the repayment of bonds—*e.g.*, the requirement in the West Virginia Constitution that a separate tax be levied at the time bonds are approved to retire them when due (W. Va. Const. art. X § 8)—are responsible for financial responsibility and integrity. We have found no study showing a correlation between the most readily

accessible indicator of the quality of local government bonds –ratings by various services–and the presence or absence of extraordinary majority requirements. Indeed, the unanticipated side effect of such requirements appears to be the development in many states of a variety of financial arrangements designed to circumvent the extraordinary majority requirements, including the establishment of "special districts" not subject to such requirements and the use of revenue bonds and lease-back arrangements. Thus, instead of contributing to financial rectitude, extraordinary majority requirements appear to bring about financial sleight-of-hand by local governmental units.

b. The California Taxpayers Association, as an *amicus*, echoed by the petitioner, claims that extraordinary majority requirements with respect to bond issues are necessary to protect "future majorities" against the "irreversible" decisions of today's profligate voters respecting the incurring of indebtedness. The claim is based upon an infirm premise. The Taxpayers Association says that, unlike the issuance of bonds, most governmental action can be "amended or repealed by the majority if the action turns out to be unwise," but the Taxpayers Association does not say how the consequences of declining to finance adequate education can be "amended or repealed." It requires no great insight to recognize that the consequences of declining to finance adequate education facilities are just as "irreversible" as the consequences of providing that financing. Beyond that consideration, the Taxpayers Association neglects to note that the extraordinary majority requirements at issue here precluded to meet current educational needs, a proposal to which the "future majorities" argument has no relevance whatsoever.

c. Finally, a decision with respect to the constitutional validity of extraordinary majority requirements applicable to bond and tax proposals, based upon the constitutional acceptability of the alleged justifications for such requirements, need not govern other kinds of extraordinary majority requirements–for example, those that allocate power

among coordinate branches of the government, and those that are designed to contribute stability to basic documents organizing the government—which are rooted in considerations quite different from those underlying the West Virginia provisions here at issue. As stated by the California Supreme Court in *Westbrook v. Mihaly, supra,* App. B-48, *infra,* each extraordinary majority requirement "must be judged on its particular facts."

ARGUMENT

Under Sections 1 and 8 of Article X of the West Virginia Constitution and implementing statutory provisions, the vote of each voter opposed to a local property tax or debt proposal subject to Section 1 or Section 8 is worth 50 percent more than the vote of each voter favoring such a proposal in determining whether the proposal will carry. That is, two "no" votes are worth three "yes" votes. That result is incontestably required by Sections 1 and 8.

As the California Supreme Court observed, such an arrangement does not simply classify voters—the ayes on the one side and the nays on the other—but also discriminates between the two classes:

> "It does not require extended discussion to establish that the inevitable result . . . is to give to one group of voters a greater influence on the outcome of an election than [is given] to another group of comparable size but opposite conviction. This is the functional equivalent of according to each person in the former group a vote of relatively greater weight precisely because of his position on the issue which is to be decided. In other words, a result identical to that produced by a two-thirds voting requirement could be achieved by requiring only a 50 percent affirmative vote for passage of bond issue proposi-

> tions but providing that in tabulating the election results each negative vote would be multiplied by two while affirmative votes would be counted at face value. Alternatively, those citizens who opposed a measure could be permitted to vote twice while those who favored it were limited to only one ballot. The biased structure of both of these voting schemes is perhaps more obvious than the discrimination inherent in an extraordinary majority vote requirement. The effect of each, of course, is identical." *Westbrook v. Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970), App. B-25, *infra*.

Given this sort of classification and discrimination between the classes established, the question is whether the discrimination is permissible under the Equal Protection Clause.

In the first section of this brief, we review the historical antecedents of our national commitment to political equality and its corollary, majority rule. We then show, in the second section of the brief, that the West Virginia requirements are invalid under this Court's apportionment decisions, which give expression to the constitutional requirements of political equality and majority rule. In the third section of the brief, we demonstrate that the West Virginia requirements are invalid under this Court's decisions in voter-exclusion cases, which hold that limitations on the franchise based upon a voter's stand with respect to political issues are constitutionally impermissible. We then go on in the fourth section of the brief to show that if the West Virginia requirements are not invalid *per se*, under the apportionment and voter-exclusion cases, they must be shown to be necessary to promote a compelling state interest, and that has not and cannot be done. Indeed, the requirements cannot even be claimed to be rationally founded upon any valid state objective. In short, by whatever test the question is decided, West Virginia's extraordinary majority requirements are unconstitutional.

A. WITH EXCEPTIONS STATED IN THE CONSTITUTION, THIS NATION IS COMMITTED CONSTITUTIONALLY TO POLITICAL EQUALITY AND MAJORITY RULE

Our Declaration of Independence committed us to political equality as a first principle of our nation. It was a "self-evident" "truth" to the authors of the Declaration that "all men are created equal," "endowed by their Creator with certain unalienable Rights," and that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ." To Jefferson, this commitment to political equality was a commitment first of all to majority rule. "The first principle of republicanism," he wrote, "is that the *lex majoris partis* is the fundamental law of every society of individuals of equal rights." Letter to Baron von Humboldt, 1817, Jefferson, *Democracy* (Padover ed., 1939). In the absence of majority rule, the political rights of the members of the majority are not equal to the political rights of those of the minority.

The Constitution restricted majority rule in a number of important respects as a consequence of the Great Compromise that was necessary to make one nation of thirteen sovereigns, and the Bill of Rights restricted majority rule still further for the purpose of preserving individual rights. Nonetheless, the principal spokesmen for the Constitution were just as fundamentally committed to political equality and majority rule as Jefferson was. Thus, Hamilton wrote in *The Federalist*, No. 22 (Cooke ed., 1961, at 138-41), that denial of majority rule was one of the principal defects in the Articles of Confederation:

> "The right of equal suffrage among the States is another exceptionable part of the confederation. Every idea of proportion, and every rule of fair representation conspire to condemn a principle, which gives to Rhode-Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New-York; and to Delaware, an equal voice in the

national deliberations with Pennsylvania or Virginia, or North-Carolina. *Its operation contradicts that fundamental maxim of republican government, which requires that the sense of the majority should prevail* . . . .

"But this is not all; what at first sight may seem a remedy, is in reality a poison. *To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency to subject the sense of the greater number to that of the lesser number.* . . .The public business must in some way or other go forward. If a pertinacious minority can controul the opinion of the majority respecting the best mode of conducting it; the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings. Hence tedious delays—continual negotiation and intrigue—contemptible compromises of the public good . . . .

"It is not difficult to discover that a principle of this kind gives greater scope to foreign corruption as well as to domestic faction than that which permits the sense of the majority to decide . . . . When the concurrence of a large number is required by the constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely *to be done*; but we forget how much good may be prevented, and how much ill may be produced by the power of hindering the doing what may be necessary . . . ." (Emphasis added in first two paragraphs.)

Accordingly, the Constitution provided that the members of the House of Representatives should be elected "by the People," and should be "apportioned among the several States . . . according to their respective numbers . . . ." Const. art. 1, § 2; see *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Some 70 years after the adoption of the Constitution, President Lincoln reaffirmed our commitment to "government of the people, by the people, and for the people," a commitment reflected shortly thereafter by the adoption of the Fourteenth and Fifteenth Amendments, and later by adoption of the Seventeenth and Nineteenth Amendments. In short, as this Court has stated, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing - one person, one vote," *Gray v. Sanders*, 372 U.S. 368, 381 (1963). That is the antithesis of the West Virginia scheme, which gives "no" voters one-and-one-half votes to every vote given "yes" voters.

B. THE WEST VIRGINIA SCHEME IS INVALID UNDER THIS COURT'S APPORTIONMENT AND EQUAL PARTICIPATION DECISIONS, WHICH ARE PREMISED UPON THE CONSTITUTIONAL REQUIREMENTS OF POLITICAL EQUALITY AND MAJORITY RULE

The constitutional requirements of political equality and majority rule have found expression in recent decisions of this Court invalidating apportionment and voting schemes that dilute the value of some citizens' votes *vis-a-vis* the votes of others.[5] Under these decisions the West Virginia scheme is clearly unconstitutional.

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[5] As the California Supreme Court observed: "more than any decade since that immediately following the Civil War, the 1960's were a time of struggle to transform America's ancient promise of political equality into a reality. Ten years ago many of our citizens were barred from the polls for reasons related to their race, economic status or national background. Others, because of extreme disparities in population among electoral districts, were denied equal representation in Congress, in state legislatures, and in units of local government. Much of this has been changed, some by federal legislation and some by constitutional amendment. But the significant and stirring reforms have been effectuated by the United States Supreme Court which has insisted that our political structures and practices, no matter how venerable their origin, comport with the Fourteenth Amendment." *Westbrook v. Mihaly, supra*, App. B-11, 12, *infra*.

Thus, in *Gray v. Sanders*, 372 U.S. 368 (1963), holding that in a given election every person's vote must be given as much weight as every other person's vote, and therefore that the Georgia County unit system of nominating candidates for state-wide office was unconstitutional, the Court said:

> ". . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . . .
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> ". . . .
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> "The only weighting of voters sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. Yet when Senators are chosen, the Seventeenth Amendment states the choice must be made 'by the people'. Minors, felons and other classes may be excluded . . . . But *once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded* . . . . The conception of political equality . . . can mean only one thing—one person, one vote." 372 U.S., at 380-81. (Emphasis added.)

Mr. Justice Stewart added that "[w]ithin a given constituency there can be room for but a single constitutional rule—one voter, one vote." 372 U.S., at 382.

Thereafter, in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court "held that the Constitution requires that 'as nearly as is practicable one man's vote in a congressional

election is to be worth as much as another's.' " *Hadley v. Junior College District, supra,* 397 U.S., at 52 (1970), quoting *Wesberry v. Sanders, supra,* 376 U.S., at 7-8. Then in *Reynolds v. Sims,* 377 U.S. 533 (1964), the Court held that the requirement of "one voter, one vote" applies to state legislative apportionment. In so holding, the Court approved the view of Mr. Justice Douglas, dissenting in *South v. Peters,* 339 U.S. 276, 279 (1949), that:

> "There is more to the right to vote than the right to mark a piece of paper and drop it in a box . . . The right to vote includes the right to have the vote counted at full value without dilution or discount . . . . That constitutionally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted." Quoted in 377 U.S. at 555-56, n. 29.

Further, the *Reynolds* Court approved the view of Mr. Justice Black, dissenting in *Colegrove v. Green,* 328 U.S. 549, 569-71 (1946):

> "No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote . . . [T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast . . . ." Quoted in 377 U.S., at 563, n. 40.

The Court then went on to hold that both houses of state legislatures must be apportioned by population, premising its holding upon the requirement that each citizen should have an equal voice in governmental decisions–*i.e.*, upon the constitutional requirements of political equality and majority rule:

> "Logically, in a society ostensibly grounded on a representative government, it would seem reasonable that a majority of the people of the State could

> elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of the State, stand in the same relation regardless of where they live . . . . [W]e conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators . . . . [T]he democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future." 377 U.S., at 565-66.

While Mr. Justice Stewart did not agree with the Court's application of the principle of political equality in *Reynolds*, he too has expressed a commitment to the values of political equality and majority rule. Thus, in *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964), he stated that he would uphold a state apportionment plan "so long as [it] reasonably achieves, in the light of the State's own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule," 377 U.S. at 751, and "that the Equal Protection Clause demands . . . two basic attributes" of any apportionment plan—that it be rational, and that it "be such as not to permit the systematic frustration of the

will of a majority of the electorate of the State." 377 U.S., at 754.[6]

The West Virginia scheme cannot stand under these decisions. To be sure, we are concerned here with state laws that frustrate majority rule at the local level rather than on a statewide basis. However, it is settled that the "one man-one vote" rule of *Gray*, *Wesberry* and *Reynolds* applies to local elections. *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior College District*, *supra*. Also, to be sure, this case concerns frustration of majority rule in a case in which the people have direct legislative powers, rather than an "election . . . held for the purpose of selecting representative government . . .," *Bogert v. Kinzer*, *supra*, 465 P.2d, at 644—an election "in which representatives are chosen to represent the people." *Brenner v. Kansas City School District*, *supra*, 39 L.W., at 2122. However, that difference, too, is immaterial. The premise of the apportionment decisions was that under the Constitu-

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[6]Using these tests, Mr. Justice Stewart, unlike the majority of the Court, would have found Colorado's apportionment plan proper, stating that:

> "The majority [by popular referendum in 1962] has consciously chosen to protect the minority's interests, and under the liberal initiative provisions of the Colorado Constitution, it retains the power to reverse its decision to do so. Therefore, there can be no question of frustration of the basic principle of majority rule." 377 U.S., at 759.

So, too, Mr. Justice Stewart believed that New York's apportionment plan should be held constitutional because it "guarantee[d] effective majority representation and control in the State Legislature," and was "designed in a rational way to insure that minority voices may be heard, but that the will of the majority shall prevail." 377 U.S., at 764, 765.

In short, both States' plans were proper under Mr. Justice Stewart's analysis because while both "sought to provide that no identifiable minority shall be completely silenced or engulfed," each State had "clearly ensur[ed] that in its legislative councils, the will of the majority of the electorate shall rule. . . ." 377 U.S., at 765.

The provisions for amendment of the West Virginia Constitution are discussed at note 7, *infra*.

tion all citizens are entitled to an equal voice in their government. See *Reynolds v. Sims, supra,* 377 U.S., at 565-66, quoted at pp. 18-19, *supra.* Therefore, it is immaterial whether governmental powers are exercised by the people through representatives, or are exercised by the people directly. In either event, "[t]he conception of political equality . . . can mean only one thing—one person, one vote." *Gray v. Sanders, supra,* 372 U.S., at 381.

Nor does it make any difference that this case involves restrictions on majority rule applicable only to two particular types of decisions—the levy of taxes and the issuance of bonds for educational purposes—rather than to a broader range of governmental decisions. "When a Court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election." *Hadley v. Junior College District, supra,* 397 U.S. at 54-55. Moreover, no local governmental decisions are more important than the kinds of decisions involved in this case. As this Court has observed, "Today, education is perhaps the most important function of state and local governments." *Brown v. Board of Education,* 347 U.S. 483, 493 (1954). "Education has traditionally been a vital governmental function. . . ." *Hadley v. Junior College District, supra,* 397 U.S., at 56. The fact that the levy of taxes and the issuance of bonds for school purposes is involved "justif[ies] the conclusion that the principle . . .applied" in the apportionment decisions "should also be applied here." *Id.,* 397 U.S., at 54.

Finally, West Virginia's extraordinary majority requirements are contained in its Constitution and thus can be amended only with the approval of representatives of two-thirds of the people of the State.[7] However, it would make

[7]Amendments to specific provisions in the West Virginia Constitution must be proposed in one or the other of the two houses of the

no difference if those provisions could be changed by a majority of the people in the State directly, or by a simple majority of the legislature. The State, for reasons it deems sufficient, has determined that tax and bond issues should be decided locally by popular referendum. But if a local majority should find themselves stymied persistently by an intractable local minority, it is no answer as a practical matter to tell them to seek relief from a majority of the State legislature, for their problem may or may not be of sufficient magnitude to command the attention of the State legislature, and it is likewise no answer to tell them that they must enlist the support of a majority of the electorate in the State as a whole, frequently an enormous undertaking. Statewide political remedies are no answer as a legal matter, either. As stated in *Lucas v. Colorado Gen. Assembly, supra,* "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a majority of a State's electorate . . . . A citizen's constitutional right can

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state legislature, and then must be approved by two-thirds of the members of each house. Thereafter, they must be approved by a majority of the electorate at the next general election. W. Va. Const. Art. XIV. There is no procedure for amendment by initiative. The only alternative way to change the State Constitution is to convene a new constitutional convention. That could be done by a majority of both houses of the state legislature with the approval of a majority of the electorate, but would be satisfactory only if review of the Constitution were desired, not amendment of a specific provision.

According to the dissenting opinion below, a proposal to amend the super-majority requirements involved in this case was approved by the legislature but defeated by the voters in 1966. Under this Court's decision in *Lucas v. Colorado Gen. Assembly, supra,* that fact is wholly immaterial to the issues in this case. Moreover, the constitutional provisions struck down by the court below can only be amended with the approval of representatives of two-thirds of the electorate in each house of the legislature. Thus, unlike the situation under the liberal initiative provisions of the Colorado Constitution referred to in Mr. Justice Stewart's dissent in *Lucas*, 377 U.S. at 713, the majority in West Virginia has not "retain[ed] the power to reverse its decision" to restrict majority rule with respect to local property tax and debt proposals.

hardly be infringed simply because a majority of the people choose that it be." 377 U.S. at 736-37.[8] *Cf., Reitman v. Mulkey,* 378 U.S. 369 (1967).

In short, under this Court's apportionment decisions–its equal participation decisions–the West Virginia scheme cannot be permitted to stand, for it denies an equal vote to voters who favor school bond and tax proposals, *vis-a-vis* their adversaries. As the Court said last term:

> "This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement.

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[8] "'The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restraint we can not, true to our oath, uphold such legislation in the face of palpable infringement of rights. Thus, state racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet no one would argue that this factor could compensate for manifest inequality. It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority. The rights which are here asserted are the rights of the individual plaintiffs to have their votes counted equally with those of other voters . . . [T]o say that a majority of the voters today indicate a desire to be governed by a minority, is to avoid the issue which this court is asked to resolve. It is no answer to say that the approval of the polling place necessarily evidences a rational plan. The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice.'" *Lisco v. Love,* 219 F. Supp. 922, 944 (E.D. Colo., 1963) (dissenting opinion); quoted in *Lucas v. Colorado Gen. Assembly, supra,* 377 U.S., at 737, fn. 30.

> " . . . [O]nce a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.' " *Hadley v. Junior College District, supra,* 397 U.S., at 54, 59 (1970), quoting *Gray v. Sanders, supra.*[9]

C. THE WEST VIRGINIA SCHEME IS ALSO INVALID UNDER THIS COURT'S DECISIONS WITH RESPECT TO DENIALS OF THE FRANCHISE.

Not only is the West Virginia scheme invalid under this Court's apportionment decisions, because it denies "one vote" to each voter, but it is also invalid under the Court's decisions with respect to denials of the franchise, beginning with *Carrington v. Rash,* 380 U.S. 89 (1965). In that case the Court struck down a provision of the Texas Constitution disenfranchising all servicemen except those who voted in the county in which they had resided at the time they entered military service. In defense of the provision, Texas argued that the State "has a legitimate interest in immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community." 380 U.S., at 93.

The State suggested that a base commander who opposed local police administration or teaching policies in local schools might influence his men, and that local bond issues might fail and property taxes be held at unduly low levels because military personnel are "unwilling to invest in the future of the area." *Id.* In rejecting that contention, the

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[9] *Fortson v. Morris,* 385 U.S. 231 (1966), relied upon by petitioner, was not to the contrary. Petitioner says that the "right of equal participation in the election process does not carry with it a constitutional right to win an election," and states that *Fortson v. Morris* "so held." (Pet. Br. pp. 8-9; see also Calif. Taxpayers Ass'n Br., p. 7.) *Fortson* held nothing of the kind, however. It held that a state could deny the governorship to candidates in a popular election who failed to receive a majority, and could allow the legislature to appoint a governor from one of the two persons receiving the largest number of votes.

Court stated that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U.S., at 94.

In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court reaffirmed its holding in *Carrington v. Rash*, striking down a Louisiana constitutional provision limiting the franchise in municipal utility revenue bond elections to property taxpayers. In so doing, the Court pointed out that "property taxpayers may be concerned with expanding and improving the city's utility operations," for "such improvements could produce revenues which eventually would reduce the burden on the property tax to support city services," while "nonproperty taxpayers may feel that their interests as rate payers indicate that no further expansion of utility debt obligations should be made." 395 U.S. at 705. But, the Court concluded, "these differences of opinion cannot justify excluding either group from the bond election, when, as in this case, both are substantially affected by the utility operations. For, as we noted in *Carrington v. Rash*, '. . . "[f]encing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.'" 395 U.S., at 706.

In this case, we have the other side of the coin from the situation in *Carrington*–a voting regulation that reflects a fear that voters may be only too willing to vote higher taxes and "invest in the future of the area." *Carrington* and *Cipriano* demonstrate, however, that a voter's stand with respect to political issues is not a valid basis upon which to restrict his right to vote.

That conclusion is directly applicable to this case. To be sure, we deal here with a measure that assigns different weights to votes, according to how they are cast, instead of denying the vote altogether. But that is immaterial. The Texas plan surely would have been condemned if servicemen, rather than being wholly deprived of the vote, had been given only two-thirds of a vote. That would constitute a partial denial of the franchise on the

basis held impermissible in *Carrington*. Also, to be sure, in this case we deal with a measure that dilutes the value of votes depending upon how they actually are cast, rather than restricting the franchise "because of the way [the disfavored class of voters] *may* vote." But that likewise is immaterial. The premise of *Carrington* and *Cipriano*, as we read those decisions, is that political orientation is not a valid basis upon which to restrict or limit the value of the vote. Therefore, the West Virginia scheme is unconstitutional for the same reasons that led this Court to strike down the provisions in the Texas and Louisiana constitutions involved in the *Carrington* and *Cipriano* cases.

At various times the right to vote has been restricted because citizens are of a particular race, see *Gomillion v. Lightfoot*, 364 U.S. 339 (1964), or because they are poor, see *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), or because they do not hold certain property interests, see *Kramer v. Union School District, supra; Cipriano v. City of Houma, supra; Phoenix v. Kolodziejski, supra*, or because they are members of the military services, see *Carrington v. Rash, supra*. Basically, the reason for such restrictions is that someone is concerned about how members of these groups "may vote" or "fear . . . the political views" of the group. *Carrington v. Rash*, 380 U.S., at 94. Voting classifications based upon such considerations are "constitutionally impermissible." *Id.* Likewise, the West Virginia method of "loading the dice" against a particular political viewpoint is unconstitutional.

D. IF THEY ARE NOT OTHERWISE UNCONSTITUTIONAL, THE WEST VIRGINIA EXTRAORDINARY MAJORITY REQUIREMENTS ARE INVALID BECAUSE THEY ARE NOT NECESSARY TO PROMOTE A COMPELLING STATE INTEREST AND INDEED ARE NOT RATIONALLY FOUNDED UPON ANY VALID STATE PURPOSE.

If the Court agrees that the decisions discussed above are dispositive, that will be the end of the case. But even if the Court does not agree with our views as to the effect of the apportionment decisions and *Carrington v. Rash*, the decision below nevertheless should be affirmed. For in that event, the question is whether the West Virginia scheme is "necessary to promote a compelling state interest" and it is clear that it is not. Indeed, it is not rationally founded upon any valid state objective.

As we understand this Court's decisions, it is settled that laws that dilute or restrict the franchise can be sustained only if they are necessary to promote a compelling state interest. Measures that restrict the franchise are presumptively unconstitutional. Thus, in *Reynolds v. Sims, supra,* the Court said that "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 376 U.S., at 17. And in *Kramer v. Union School District*, 397 U.S. 621 (1969), the Court added:

> "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.
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> "Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court . . . . No less rigid an examination is applicable to statutes *deny-*

> *ing* the franchise to citizens who are otherwise qualified by residence and age . . . . [I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest
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> ". . . [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable . . . ." 395 U.S., at 626-28 (emphasis added).

Likewise, as stated in *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), in which the Court struck down restrictions on the franchise with respect to general obligation bond elections–the type of election involved in this case–the Court said:

> "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise . . . . Placing [the power to approve or disapprove facilities which the municipal government has determined should be financed by issuing general obligation bonds] in property owners alone can be justified only by some overriding interest of those owners which the State is entitled to recognize." 399 U.S., at 209.

The West Virginia provisions now before this Court undeniably value "yes" votes less than "no" votes in determining the outcome of local bond and tax elections. Thus, they dilute the value of votes cast by "yes" voters *vis-a-vis* the votes cast by those who oppose them, or to phrase it another way, they partially deny some voters a vote by giving other voters a bigger vote. Accordingly, if the West Virginia extraordinary majority requirements are not invalid

per se, they clearly can be sustained only if they are "necessary to promote a compelling state interest."

The West Virginia requirements do not meet that test. Indeed, they are not rationally founded upon any valid state purpose. That is demonstrated, we believe, both by this Court's decisions in *Kramer v. Union School District, supra*, and the bond election decisions based upon *Kramer*,[10] and by an appraisal of the allegedly relevant state interests.

In *Kramer*, the Court struck down a New York law that limited the franchise in certain school elections to property holders and parents, classes of voters alleged to be "primarily interested" in such elections. In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court struck down a similar Louisiana constitutional provision that limited the franchise in municipal utility revenue bond elections to property taxpayers. In *Phoenix v. Kolodziejski, supra*, the Court struck down an Arizona law that similarly limited the franchise in local general obligation bond elections to property taxpayers. In striking down these provisions, the Court stated that citizens other than property taxpayers may well be interested in school elections and the issuance of bonds, see 396 U.S., at 632, 705, and 399 U.S., at 212, and therefore that the classifications in question did not serve the purpose of limiting the vote to interested classes of voters sufficiently to justify restrictions on the franchise. These decisions demonstrate clearly that the interest of property taxpayers in limiting governmental expenditures is not an interest which can justify restrictions on the franchise. In this connection, there surely is no difference between denial of the franchise altogether and the weighting of votes. The result would have been no different in *Kramer, Cipriano* and *Phoenix* if the State had given everyone one vote, and property taxpayers two. As stated in *Phoenix*, "[p]resumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Cons-

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[10] *Cipriano v. City of Houma, supra; Phoenix v. Kolodziejski, supra.*

titution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise . . . . Placing [the power to approve or disapprove facilities which the local government has determined should be financed by issuing general obligation bonds] in property owners alone can be justified only by some overriding interest of those owners which the State is entitled to recognize." 399 U.S., at 209. Thus, under this Court's decisions, protecting property taxpayers from the improvidence of majorities is not a compelling state interest that can justify restrictions on the franchise. It cannot be claimed that such restrictions are necessary to promote a compelling state interest.

Moreover, even if the question were still open under this Court's decisions, the conclusion should be the same. We are aware of only two alleged justifications for extraordinary majority requirements with respect to bond and tax elections. First, petitioner suggests that such requirements serve to curb fiscal extravagance and thus contribute to "financial integrity." (*E.g.*, Pet. Br. p. 11.) Second, petitioner and the California Taxpayers Association both claim that such requirements protect "future majorities" with respect to the "irreversible" "assumption of financial burdens which bind all of the people for long future periods." (*E.g.*, Calif. Taxpayers Ass'n Br. p. 4.) However, neither alleged justification is sound; neither can support the claim that extraordinary majority requirements are necessary to promote a compelling state interest, or even that they are rationally founded upon a legitimate state objective.

1. Local Extravagance and Financial Integrity.

No one can quarrel with the claim that it is desirable for local governmental units to avoid imprudent and extravagant expenditures. However, extraordinary majority requirements contribute nothing to that objective, and clearly are not "necessary" to promote it. On the contrary, they often contribute to financial irresponsibility, rather than serving to curb it.

Extraordinary majority voting requirements for local bond issue elections were originally enacted in West Virginia and a number of other states in reaction to the serious depression that engulfed the country during the 1870's. Numerous local governmental units found themselves seriously overextended and defaulted on their bond issues, especially transportation bond issues. Advisory Commission on Intergovernmental Relations, State Constitutional and Statutory Restrictions on Local Government Debt (1961), pp. 19-20.

Since the 1870's, there have been major changes in local government financing which effectively discourage extravagant expenditures and preclude a repetition of the experience of the 1870's. A recent study of the Advisory Commission on Intergovernmental Relations mentioned three institutional developments which are relevant in this connection: "(1) A cadre of experienced and increasingly professional local finance persons has come into being . . . . (2) There has been a parallel development of principles, standards, systems and techniques for financial administration . . . . (3) The institutional system that now exists for informed and orderly marketing of local government securities . . . developed near the end of the 19th century and has since been greatly strengthened and refined . . . ." Advisory Commission Report, *supra*, at p. 22.

In addition, states have adopted a variety of genuinely effective measures to limit local public indebtedness and curb imprudent and extravagant expenditures, none of which requires invidious discrimination among voters.[11] For example, Article X, Section 8 of the West Virginia Constitution, which contains the 60 percent voting requirement, also imposes an absolute maximum limitation on debt. Even more important, it requires that counties, cities and school districts "provid[e] for the collection of a direct annual tax on all taxable property . . . separate and apart from

[11]Other restrictions are listed in the Advisory Commission Report, supra, at 27 and n. 26.

and in addition to all other taxes for all other purposes, sufficient to pay, annually, the interest on [any] debt, and the principal thereof," within 34 years. And the States that require that a referendum be held, but call for merely majority approval, insure that the proposed indebtedness will be subject to a popular, as well as a legislative, judgment. One commentary has suggested an additional control which might be used if necessary—"a state-level commission to review and approve [and possibly to underwrite] local proposals for new bond financing." Scott and Hamilton, *infra*, at 5-6. As noted above, none of these deterrents to unnecessary and unwise borrowing requires invidious discrimination among voters.

As a consequence of these institutional changes in the issuance and marketing of local governmental securities and the development of effective means to assure fiscal "integrity," bonds of local governmental units backed by the taxing power are unusually secure investments today, as everyone knows. Defaults are virtually unknown, and the market for such securities is stable. This increased stability is not limited to those states that have imposed extraordinary majority requirements. Rather, it is characteristic also of bonds issued in the 33 states that have no extraordinary majority requirements applicable to the kinds of measures involved in this case. See *Westbrook v. Mihaly*, *supra*, App. B-34, *infra*; Scott and Hamilton, *Extraordinary Majority Voting Requirements*, 10 Pub. Affairs Report, No. 4 (Univ. of Calif., Institute of Governmental Studies, Aug. 1969), p. 2. Our research has led us to conclude that no correlation *has ever been shown* between the most readily accessible indicator of the quality of government bonds—their ratings by the various services—and the presence or absence of such requirements.

Thus, the claim that extraordinary majority requirements contribute to financial "integrity," to use petitioner's phrase, appears to be unfounded. At *best*, such requirements are a neutral factor, and the available evidence indi-

cates that they may actually contribute to financial irresponsibility, as a consequence of unanticipated side effects of the imposition of such requirements. Thus, in order to avoid these and similar restrictions, local officials have made constantly increasing use of nonguaranteed debt or so-called "revenue bonds" which in many states are not subject to referendum requirements. See, *e.g.*, Advisory Commission Report, *supra*, at 53-54; Mitchell, W.E., *The Effect of Debt Limit on State and Local Government Borrowing*, N.Y.U. Inst. of Finance Bulletin, No. 45, Oct. 1967. Because this type of bond is not backed by the full faith and credit of the issuing entity, the local authorities often must increase the interest rates and terms in order to make them more marketable. Mitchell, *The Effect of Debt Limit*, *supra*. Obviously, this increased cost is passed on to the local residents.

Moreover, referendum requirements, particularly those requiring substantial super-majorities, are also circumvented in some states by the establishment of frequently overlapping "special district" governments not subject to such requirements. In some states, these "special districts" are created to issue revenue bonds, construct needed facilities, and lease the facilities to governmental units that would be subject to referendum and super-majority requirements if they undertook to build the facilities themselves. In others, they are employed to enlarge the borrowing capacity of a given geographical area under legal limitations like those involved in this case. As the Advisory Commission Report points out, the proliferation of special districts caused by these restrictions "is often a handicap not only to consistent planning and administration but also to citizen understanding and control of local government as a whole." Advisory Commission Report, *supra*, at 58.

Thus, far from contributing to financial rectitude—to financial "responsibility" and "integrity"—the extraordinary majority requirements contribute to the development of jerrybuilt financial vehicles and arrangements—to fiscal *irre-*

sponsibility. In any event, "the diversion of local borrowing into novel, more costly financing methods which often entirely evade submission to elections, renders any claim that the [extraordinary majority] requirement insures sound fiscal policy and popular control of long-term borrowing highly dubious at best." *Westbrook v. Mihaly, supra*, p. B. 38, *infra*.

2. Future Majorities

The argument that supermajority requirements are necessary to protect future generations–tomorrow's "majorities"–against the improvidence of today's majorities has even less to commend it. The argument, as put by the California Taxpayers Association, is that "most action can be . . . amended or repealed by a majority if the action turns out to be unwise or its burdens too great. This is not true of bonds." (Calif. Taxpayers Ass'n. Br., p. 16.) Rather, the decision to incur indebtedness is said to be "irreversible." (Calif. Taxpayers Ass'n. Br., p. 3.) The Taxpayers Association does not say, however, how one goes about "amending or repealing" the consequences of deficient educations. If needed school bonds are approved, they must of course be paid. But if they are not approved, schools will not be built. It requires no great sophistication to recognize the "irreversible" consequences of inadequate educational facilities. As the California Supreme Court stated in *Westbrook v. Mihaly, supra*:

> " . . . We are told that long-term borrowing irrevocably commits the future revenues of a community and that such a drastic step should not be undertaken upon the will of a mere majority. However, many decisions of government at all levels are crucial and irreversible, yet this alone has never been thought a sufficient ground upon which to remove them from the democratic process. We are not persuaded that a decision to commit future tax revenues to the financing of projects whose scale and useful life make payment of their costs

from current revenues impracticable or inequitable is so unique or so fraught with peril that it warrants this deprivation of voting rights.

"We do not think respondents have demonstrated that bond-finance decisions are fundamentally different from many other political decisions made by a majority vote or by representatives elected by a majority vote. Even assuming, however, that respondents had done so we think their argument fails at another level. This justification for the extraordinary majority requirement rests on the premise that a decision to *undertake* a project such as the construction of schools and playgrounds is qualitatively different from a decision *not to* do so. This, in turn, is based on the assumption that spending money is a more serious matter than not spending it and, consequently, must be justified whereas frugality is self-justifying. A predisposition to thrift may serve a man well. It does not, however, justify governmental inertia, especially when government is faced with critical social problems demanding urgent and sometimes costly remedies. There is no presumption in favor of inaction, as the United States Supreme Court observed in *Avery v. Midland County, supra,* 390 U.S. 474, 484: '[W]e might point out that a decision not to exercise a function within [local government's] power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens . . . as an affirmative decision.'" (App. B 39-40, *infra*).

Moreover, even if there were any substance to the "future majorities" argument with respect to bond proposals, this case also involves the application of an extraordinary majority requirement to a proposal to levy *current taxes to meet current educational needs.* The "future majorities" argument has no relevance whatever to such a proposal.

3. Analogies to Other Supermajority Requirements

Finally, it should go without saying that a decison with respect to the necessity or rationality of alleged justifications for extraordinary majority requirements applicable to bond and tax proposals will have no application to extraordinary majority requirements applicable to other kinds of decisions left to the voters. *E.g.*, see *Rimarcik v. Johansen*, No. 147, 1970 Term (extraordinary majority requirement applicable to amendments to local liquor control laws). As stated by the California court in *Westbrook v. Mihaly, supra*,

> "Respondents press a final argument upon us. They point out that the extraordinary majority requirement of article XI, section 18, is not unique and that there are many contexts in which governmental action is conditioned upon the ability of its proponents to secure the support of more than a bare majority . . . . They then admonish us that, *since the two-thirds requirement* cannot be distinguished from any of these provisions, a decision invalidating it will inevitably undermine the constitutionality of all. We cannot agree.
>
> "First, there is no merit to the attempt to analogise section 18 to institutional arrangements of varied historical origin and specialized function, such as the electoral college, the allocation of two senate seats to each state regardless of population, or the unanimous jury verdict required for a criminal conviction. Efforts to justify state-imposed inequalities in voting power through reliance on analogies to other distinct institutions have met with no success in the United States Supreme Court. For example, in *Gray v. Sanders, supra*, 372 U.S. 368, 378, the court declared: 'We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historic concerns, validated the collegiate principle despite

its inherent numerical inequality, but implied nothing about the use of an analogous system by a State . . . .' (Fns. omitted.) In *Reynolds v. Sims, supra,* 377 U.S. 533, 573, the court observed that: 'Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements.' Our reaction to analogies to, for example, the treaty ratification procedure in the United States Senate is not dissimilar.

"Second, many of the extraordinary majority provisions to which we are referred are readily distinguishable in that, since they apply solely to the internal procedures of legislative bodies, they involve no dilution of the individual exercise of the franchise which is in issue here. Some, such as the two-thirds required for conviction of impeachment (U. S. Const., art. I, § 3) or expulsion from Congress (U.S. Const., art. I, § 5) are designed to avoid precipitate action in areas of particular importance or sensitivety. Others, such as the two-thirds required to override a presidential (U.S. Const., art. I. § 7) or gubernatorial (Cal. Const., art. IV, § 10(a)) veto or the two-thirds required to ratify a treaty (U.S. Const., art. II, § 2) represent those basic allocations of power between branches of government which are at the heart of that great system of 'checks and balances' established by the founding fathers. In neither case is there any infringement of the individual citizen's right to vote such as that effected by section 18.

"Finally, those extraordinary majority vote requirements which do apply outside the legislative process are by no means uniformly invalidated by our decision today. We emphasize that while it has not been demonstrated that a two-thirds vote requirement for approval of local general obligation bonds is necessary to promote a compelling state interest, similar provisions in other contexts may meet this standard. For example, it is common to

> insist upon a broad consensus before altering basic political documents. (See, e.g., U.S. Const., art. V.) Documents such as constitutions exist partly to provide continuity and stability to the affairs of state. This is a goal of fundamental importance and one which can be achieved only by protecting such charters from the will of temporary majorities. We see no *a priori* reason to assume that other extraordinary majority provisions cannot be shown to be necessary to attain 'compelling' ends. Each must be judged on its particular facts. Those which serve no such end will fall, but our decision today commits us to no wholesale elimination of such laws. We, of course, express no opinion as to the validity of any of the foregoing provisions."

In sum, West Virginia's extraordinary majority requirements serve no rational, valid state purpose, and clearly are not "necessary to promote a compelling state interest." Accordingly, by whatever standard they are tested, they are unconstitutional under the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Appeals of the State of West Virginia should be affirmed.

Respectfully submitted,

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APPENDIX A

Table 1
*Assessed Valuation of West Virginia Counties, 1969

Counties	Total Assessed Valuation (All Properties)
1. Kanawha	$1,058,438,000
2. Cabell	438,844,740
3. Wood	267,710,260
4. Ohio	256,066,300
5. Harrison	235,964,880
6. Hancock	215,522,350
7. Monongalia	203,753,570
8. Marion	194,708,033
9. Mercer	170,890,640
10. Raleigh	165,488,250
11. Marshall	150,696,950
12. McDowell	133,840,490
13. Fayette	133,757,210
14. Berkeley	166,182,755
15. Wayne	110,056,210
16. Brooke	109,852,200
17. Logan	102,776,600
18. Jackson	100,102,980
19. Greenbrier	97,807,265
20. Wyoming	90,435,550
21. Mason	89,103,210
22. Mingo	88,629,800
23. Preston	78,344,675
24. Putnam	76,974,421
25. Lewis	75,262,940
26. Randolph	74,589,695
27. Jefferson	72,867,345
28. Boone	68,472,825

*Source - West Virginia Tax Commissioner, Report of Classified Assessed Valuation 1969

29. Wetzel	64,744,780
30. Upshur	56,759,175
31. Nicholas	56,027,400
32. Mineral	54,881,770
33. Grant	53,596,190
34. Roane	45,751,560
35. Hampshire	41,783,294
36. Lincoln	37,143,255
37. Summers	36,785,290
38. Taylor	36,523,190
39. Barbour	35,844,415
40. Ritchie	33,339,050
41. Braxton	33,147,893
42. Hardy	33,083,380
43. Gilmer	32,085,460
44. Pleasants	31,588,830
45. Daddridge	30,364,020
46. Tyler	30,062,750
47. Morgan	28,357,140
48. Pocahontas	28,099,570
49. Monroe	26,520,035
50. Webster	26,040,550
51. Calhoun	23,262,655
52. Pendleton	21,044,170
53. Clay	20,851,750
54. Tucker	17,891,290
55. Wirt	10,467,290
	$5,923,216,926

Table 2

*Per Capita Personal Income of
West Virginia Counties, 1966

1. Ohio	$2,891
2. Jackson	2,862
3. Hancock	2,818
4. Morgan	2,652
5. Marshall	2,636
6. Jefferson	2,618
7. Monongalia	2,597
8. Hardy	2,594
9. Marion	2,560
10. Wetzel	2,509
11. Grant	2,480
12. Kanawha	2,400
13. Harrison	2,383
14. Cabell	2,370
15. Barbour	2,260
Raleigh	2,260
17. Berkeley	2,240
18. Logan	2,190
WEST VIRGINIA	2,176
19. Wood	2,162
20. Fayette	2,123
21. Greenbrier	2,095
22. Pleasants	2,065
23. Pendleton	2,061
24. Pocahontas	2,053
25. Brooke	2,046

*Source: West Virginia Educational Association, Rankings of the Counties 1968.

26.	Mason	2,032
27.	Hampshire	1,992
28.	Boone	1,961
29.	Ritchie	1,956
30.	Webster	1,947
31.	Tucker	1,944
32.	Doddridge	1,924
33.	Nicholas	1,912
34.	Braxton	1,893
35.	Mineral	1,892
36.	Randolph	1,854
37.	Mercer	1,847
38.	Roane	1,830
39.	Putnam	1,817
	Gilmer	1,768
41.	Preston	1,768
42.	Taylor	1,759
43.	McDowell	1,730
44.	Summers	1,720
45.	Upshur	1,693
46.	Wyoming	1,689
47.	Monroe	1,669
48.	Calhoun	1,628
49.	Tyler	1,624
50.	Mingo	1,583
51.	Wayne	1,563
52.	Wirt	1,557
53.	Clay	1,547
54.	Lewis	1,489
55.	Lincoln	1,236

Table 3

*Actual Per Pupil Expenditures of West Virginia Counties 1967-68

Barbour	$509.85	Monongalia	$565.78
Berkeley	465.49	Monroe	531.99
Boone	520.08	Morgan	538.02
Braxton	545.53	McDowell	540.84
Brooke	613.31	Nicholas	463.34
Cabell	632.05	Ohio	664.77
Calhoun	543.39	Pendleton	550.16
Clay	516.95	Pleasants	671.96
Doddridge	550.54	Pocahontas	602.45
Fayette	549.60	Preston	521.29
Gilmer	601.41	Putnam	553.80
Grant	594.53	Raleigh	542.70
Greenbrier	448.15	Randolph	457.68
Hampshire	534.20	Ritchie	572.51
Hancock	796.50	Roane	509.77
Hardy	530.25	Summers	514.46
Harrison	503.41	Taylor	489.91
Jackson	471.62	Tucker	497.81
Jefferson	558.55	Tyler	502.88
Kanawha	602.03	Upshur	513.74
Lewis	552.59	Wayne	599.61
Lincoln	572.37	Webster	573.84
Logan	535.42	Wirt	568.85
Marion	494.64	Wood	585.56
Marshall	718.35	Wyoming	535.46
Mason	677.61		
Mercer	587.96	State Average	564.13
Mineral	517.77		
Mingo	496.01	**National Average	680.00

*Source: West Virginia Board of School Finance. *The School Dollar*. February 1969.

**Source: National Education Association Research Division, *Rankings of the States*, 1969.

Table 4

Special Bond and Excess Levy Elections
Roane County 1960 - 1968*

Date	Purpose	For	Against	Percent For
12-9-60	$180,000 Excess Levies ($50,000 salaries; $130,000 capital improvements)	1,219	2,802	30.31%
11-64	$245,000 Excess Levies ($120,000 salaries, books and transportation; $125,000 capital improvements)	3,833	3,031	55.84%
2-19-65	$203,000 Excess Levies ($73,000 salaries and transportation; $130,000 capital improvements)	2,215	2,003	52.51%
3-22-68	$1,830,000 bonds for capital improvements	2,646	2,181	54.81%
3-22-68	$156,000 Excess Levies ($119,000 salaries and transportation; $62,000 capital improvements)	2,618	2,185	54.50%
4-29-68	$1,830,000 bonds for capital improvements	2,887	2,713	51.55%
4-29-68	$156,000 Excess Levies ($119,000 salaries and transportation; $62,000 capital improvements)	2,866	2,697	51.51%

*Source: Complaint, Exhibit B.

Table 5

States That Require Extraordinary Majorities In Local Elections Relating to School Bonds and Increased Tax Levies For Educational Purposes

State	Percentage Requirement	Application	Citations
Alabama	60	Special County School Tax	Ala. Const. art XIV, §269
California	66 2/3	All bonded indebtedness	Cal. Const. art. XI, §18
Idaho	66 2/3	All bonded indebtedness; Tax Levies above a stated maximum level	Idaho Const. art. VIII, §3, Idaho Code §§33-802, 1102-04
Iowa	60	All bonded indebtedness	Iowa Code Ann. Title IV, §75.1, Title XII, §274.2
Kentucky	66 2/3	All bonded indebtedness	Ky. Const. §§157; Ky. Rev. Stat. §§162.080, 162.090, 162.100
Massachusetts	66 2/3	All bonded indebtedness	Mass. Code Ann. Ch. 44 §9
Mississippi	60	All bonded indebtedness	Miss. Code Ann. §§6532-04, 6532-07
Missouri	66 2/3	All bonded indebtedness; Tax Levies above a stated maximum level	Mo. Const. art. VI, § 26(b), art. XI, § 11(c); Mo. Code § 164.151
Nebraska	55	All bonded indebtedness; Tax Levies above a stated maximum level in certain classes of school districts	Neb. Rev. Stat. §§10-701, 702-04, 79-432
New Hampshire	66 2/3	All bonded indebtedness*	N.H. Rev. Stats., §33-8
New York	66 2/3	All bonded indebtedness incurred by districts other than city school districts	N.Y. Const., art. VIII, § 4; N.Y. Local Finance Law §104.00

*This requirement does not apply to 9 cities where bonds may be issued by the city council.

	60	All bonded indebtedness incurred by districts in cities with a population under 125,000 (Cities with a higher population cannot exceed constitutional debt limits'	Id.
		Tax Levies above a stated minimum level for school districts coterminus with or partly or wholly in a city of less than 125, 000 pop.	N.Y. Const., Art. VIII, § 10
North Dakota	60	All bonded indebtedness; Tax Levies which are 25-75% above the stated maximum limit	N.D. Code §§ 21-03-07, 57-16-02, 57-16-05
Oklahoma	60	All bonded indebtedness	Okla. Const. art. X, § 26; Okla. Stats. Ann. § 70-15-3
South Dakota	60	All bonded indebtedness	So. Dak. Comp. L. § 9-26-1
Texas	66 2/3	Special County Tax Levy	Tex. Civ. Stat. art. 7048
Washington	60**	All bonded indebtedness; Tax Levies exceeding 40 mills on the dollar of assessed valuation	Wash. Const. art. VIII, § 6, amend. 27, art. VII, sec. 2, amend. 17; Wash. Rev. Code §§ 39. 36.020, 84.52.056
West Virginia	60	All bonded indebtedness; Tax Levies above a stated maximum level	W. Va. Const. art. X, §§ 1, 8, 10; W. Va. Code §§ 13-1-4, 13-1-14

**The total number of votes cast must be at least 40 per cent of the total vote in the last preceding general election.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

ELOUISE WESTBROOK, et al.,

Petitioners,

v. SF 22706

EMMERY MIHALY, as Registrar of Voters, etc., et al.,
Respondents.

STEPHEN ADAMS,

Petitioners,

v. SF 22707

EMMERY MIHALY, as Registrar of Voters, etc., et al.,

Respondents

[OPINION OF THE COURT*]

We are presented in these cases with a common issue: whether that portion of article XI, section 18 of the California Constitution which requires that general obligation bond proposals of counties, cities and school districts be approved by a two-thirds majority of the voters in a popular referendum violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. Section 18 provides, in relevant part, "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the

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*The companion opinions of the California Supreme Court in *Alhambra City School District v. Mize, Larez v. Shannon,* and *Foytik v. Aronson* are reported at 87 Cal. Rptr. 867-873, 471 P.2d 515-523 (1970).

qualified electors thereof, voting at an election to be held for that purpose, . . ."[1]

Two bond issue proposals were submitted to the voters of San Francisco at a special election held in November 1969. Proposition "A" sought authorization for the City and County of San Francisco[2] to incur a bonded indebtedness of $9,998,000 for additions to and improvements of its park and recreation system. Proposition "B" sought authorization for a bonded indebtedness in the amount of $5,000,000 to provide new elementary schools and to modernize existing school facilities in the Hunters Point area of the city. Both propositions received the approval of a majority of the voters but less than the two-thirds required by article XI, section 18.[3]

Petitioners in S.F. 22706 are residents of and registered voters in San Francisco. Some of them are property owners; others are parents of children attending public schools in the Hunters Point neighborhood. All voted in favor of both

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[1] Towns and townships do not exist as local governmental units in California and boards of education are simply the governing bodies of school districts. (See Cal. Const. Revision Com., Background Study, Article XI: Local Government, p. 363.) Thus section 18 effectively applies only to counties, cities, and school districts, which are, however, the basic units of local government in the state.

In addition to requiring extraordinary majority voter approval, section 18 provides, as a condition to the incurring of long-term debt, that "provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, . . ." The maximum term of such indebtedness is fixed at 40 years. Petitioners do not challenge these regulations of local borrowing.

[2] San Francisco is a consolidated city and county. It is subject to the provisions of section 18 by virtue of article XI, section 7 of the California Constitution.

[3] Proposition "A" received the affirmative votes of 56.8 percent of those voting on the proposition; Proposition "B" received the support of 52.3 percent of those so voting.

Proposition "A" and Proposition "B." Petitioner in S.F. 22707 is a resident of and registered voter in San Francisco who also voted in favor of both propositions. Respondents in both cases are various officials of the city and county who are charged with certain duties in connection with municipal bond elections.[4] Through their respective attorneys, petitioners demanded of respondents that they certify both propositions as having been approved by the voters and that they take all further steps necessary to offer the bonds for sale. Respondents refused, taking the position that, since neither proposition had received the assent of two-thirds of the voters as required by article XI, section 18, they had no duties to perform in connection therewith other than that of certifying the actual results of the election to the San Francisco Board of Supervisors.

Petitioners then commenced these proceedings contending that the two-thirds vote requirement, by giving to each negative voter twice the voting power of each affirmative voter, substantially diminishes the effect of the votes of all persons who, like petitioners, favor passage of propositions authorizing the incurring of bonded indebtedness. Such "dilution" of voting power, it is claimed, denies their right to the equal protection of the laws. Invoking our original jurisdiction (Cal. Const., art. VI, § 10), petitioners in each case seek: (1) a declaration that article XI, section 18 of the state Constitution, insofar as it requires a two-thirds rather than a simple mathematical majority to approve the incurring of bonded indebtedness, is invalid under the Fourteenth Amendment to the United States Constitution; and (2) a peremptory writ of mandate commanding respondents to certify that the propositions at issue herein were duly approved and authorized by the qualified voters of the City and County of San Francisco and to proceed with all actions

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[4] Respondent Mihaly is the registrar of voters, respondent Dolan the clerk of the board of supervisors, and respondent Cooper the controller, of the City and County of San Francisco.

necessary to offer the bonds for sale. We issued alternative writs of mandate. Respondents have made returns thereto by demurrer and answer. (Code Civ. Proc., § 1089; Cal. Rules of Court, rule 56(c).) By issuing the alternative writs we have necessarily determined that there is no adequate remedy in the ordinary course of law and that each case is a proper one for the exercise of our original jurisdiction. (County of Sacramento v. Hichman (1967) 66 Cal.2d 841, 845; see Cal. Rules of Court, rule 56(a).

This court has considered the scope and applicability of article XI, section 18 on several occasions since it became a part of our state Constitution in 1879. In this case, however, we face for the first time a challenge to the provision on federal constitutional grounds. When, as here, a state law is claimed to violate the equal protection clause, we must consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." (Fn. omitted.) (Williams v. Rhodes (1968) 393 U.S. 23, 30.) We begin with a synopsis of the events leading up to the adoption of the challenged provision.

The California Constitution of 1849 contained no debt limits applicable to cities or other local governmental units. However, it did require that any state indebtedness in excess of $300,000 be approved by a majority of the voters in a statewide referendum (Cal. Const. of 1849, art. VIII)[5] and

[5]The substance of the provision is retained in the present article XVI, section 1. During the early part of the Nineteenth Century, the eastern states borrowed heavily to finance capital improvements such as railroads, turnpikes, and canals. These ventures ended in financial disaster in 1837. "The midwestern states went through a similar cycle . . . two decades later. Unable to meet their obligations, the states wound up these enterprises with great financial loss. Such . . . experiences led either to the abolition of the power to borrow for state improvements in the state legislature . . . or to the introduction of various spending and financial restrictions in the state constitution." (Fn. omitted.) (L. Chermak, The Law of Revenue Bonds (1954), p. 53.)

authorized the state Legislature to organize cities and restrict their powers of ". . . borrowing money, contracting debts, and loaning their credit, so as to prevent abuses . . . ." (Cal. Const. of 1849, art. IV, § 37.) The Legislature, however, exercised this power only sporadically and such restrictions

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The constitutional limit on state debt incurred without the approval of a popular majority came before this court in *People v. Johnson* (1856) 6 Cal. 499. We set forth at some length the opinion of Chief Justice Murray not simply for its description of the period but because it is a revealing example of the profound, moral reaction against financial extravagance on the part of government. He observed: "The framers of our State Constitution were mostly men fresh in the experience of the errors which other States had fallen. They had witnessed the unhappy results that followed extravagant legislation, and were anxious to rear a bulwark here, which would protect us against similar disasters. They were thoroughly acquainted with the history of the gigantic schemes of internal improvements entered into by the South and West; of the establishment of banks; of the expansion of their circulating medium; of the inflation of everything; of the general demoralization, which resulted from an uncontrolled power of legislation; and, in fact, of the weakness of human nature itself. They had witnessed ruin like an avalanche overwhelm them, destroying visionary hopes of wealth and greatness, and leaving them to sink beneath the crushing weight of debt and taxation, or driving them to the more dishonorable alternative of repudiation . . . .

"With these examples before them, in a country whose very atmosphere was heavy with gold, . . . can it be wondered that the framers of our Constitution should have attempted to prevent the evil consequences which they foresaw, by constitutional checks and barriers? No one can doubt their intention, and it is only to be regretted that that which was so wisely begun, has been so rashly departed from. . . .

"If we were at liberty to decide this case on grounds of public policy, we could not hesitate one moment between bankruptcy and ruin, or credit and prosperity. It is time that the axe should be laid at the root of this political evil; that this system of extravagance, which has been the curse of the State for the last five years, . . . should be stopped; and that honesty, prudence and economy should preside over the legislation of the State, and the administration of her financial affairs." (6 Cal. 499, 503-505.)

on municipal indebtedness as did exist were contained in the charters of individual cities rather than in general laws.[6] Indeed, state regulation typically took the form of numerous special acts authorizing particular cities to incur specific indebtedness, often in total disregard of the local charter restrictions.[7] In California, as elsewhere, municipal debt increased dramatically.[8]

The bubble burst in the 1870's as California followed the rest of the nation into a severe financial depression. Banks collapsed, the securities markets declined, municipalities defaulted on their bonds, businesses closed and trade stagnated.[9]

[6] Restrictions varied from outright prohibition to authority to borrow without limit. Twenty-six out of sixty-eight charter cities required elections to incur certain types of indebtedness but only four required extraordinary majorities. (Starner, General Obligation Bond Financing by Local Governments: A Survey of State Controls (Univ. of Cal., Bureau of Public Administration 1961) p. 7.)

[7] One commentator has noted that "Much of the over-extended municipal debt of the mid-Nineteenth Century stemmed from the excessive zeal of local communities for transportation links, particularly for rail development." (Starner, *op. cit. supra*, at p. 7.) An example of this, and of the state Legislature's casualness in acceding to demands for special legislation, was an act passed in 1866 authorizing the City of Petaluma to issue $500,000 in bonds to construct locks, dams, and canals on the Petaluma Creek and to collect tolls from the vessels which, it was anticipated, would use the network. (See Beebe, et al., *Joint Powers Authority Revenue Bonds* (1968) 41 So. Cal. L. Rev. 19, 24.) Unsuccessful ventures such as this were among the "abuses" referred to in article IV, section 37 of the 1849 Constitution.

[8] "With the Federal Government remaining impotent and the state governments restricting their public works activities, the burden of furnishing internal improvements . . . fell upon the local governments and private enterprise. Municipal debt rose from $20,000,000 in 1840 to $200,000,000 in 1860, being used primarily for the financing of the paving and sewering of streets, the constructing of water supply systems, and the making of railroad stock subscriptions. When the crisis of 1873-1874 found municipal debt vastly in excess of state debt, constitutional and statutory restrictions upon municipal borrowing were adopted . . . ." (Chermak, *op. cit. supra*, at pp. 53-54).

[9] D. Fehrenbacher, A Basic History of California (1964) at page 48.

As foreclosures and unemployment mounted, thousands drifted from the farms to the cities vainly seeking work.[10] The general mood was one of disillusionment and anger and the state was swept by radical political movements. It was thus in an atmosphere of economic and political crisis that the delegates to the Constitutional Convention set to work in 1878.[11]

A combination of state and local mismanagement, aggravated by the depression, had created widespread concern over excessive municipal indebtedness and the processes of local debt formation.[12] Popular dissatisfaction had begun to focus on the special legislation authorizing local indebtedness since it was felt that this gave undue influence to narrow interest groups seeking public financing of projects from which they would reap disproportionate benefits. The practice was considered to be a major cause of the inordinate mass of debt with which many communities were burdened.[13] It is, therefore, not surprising that when the

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[10]R. Roske, Every Man's Eden: A History of California (1968) pp. 378-379. There were 10,000 workingmen unemployed in San Francisco alone which, at that time, was a city of only 165,000.

[11]Mr. O'Donnell, a delegate from San Francisco and a member of the Workingmen's Party, described the social conditions which had led to the calling of the convention: "The people were suffering great social and political wrongs. There was sloth in the mart and schism in the temple; corruption in office and out of it. Murmurs of discontent arose among the people . . . ." (1 Debates and Proceedings of the Constitutional Convention, p. 17.) Colonel Hoge, a representative of a more moderate faction, who was elected president of the convention, was less rhetorical but hardly more sanguine: "We have met, gentlemen, at not the most favorable time for making a Constitution. For many causes there seems to be very great depression in the business and industrial enterprises of the country. To some extent we have fallen upon evil times . . . ." (*Id.* at p. 22.)

[12]Scott and Hamilton, Extraordinary Majority Voting Requirements, 10 Public Affairs Report No. 4 (Univ. of Cal., Institute of Governmental Studies, Aug. 1969), p. 2.

[13]Starner, *op. cit. supra*, at p. 6.

delegates confronted the problem of regulating municipal indebtedness, one of their solutions was to strip the state Legislature of any role in its creation. This, inter alia, was accomplished by the absolute ban on special legislation contained in article IV, section 25 of the new Constitution.[14]

Article XI, section 18, however, provided the principal instrument for the control of local borrowing. It is apparent, from a reading of the section, that one of its purposes was to establish the "pay as you go" principle as a cardinal rule of municipal finance. Accordingly, the section requires each year's expenditures to be satisfied from the income of that year, thus preventing a gradual year-by-year amassment of liabilities. As a result, the actual cost of municipal government is more closely reflected in the tax rate and the citizens are better able to make informed judgments on the performance of their elected officials. San Francisco Gas Co. v. Brickwedel (1882) 62 Cal. 641, the first case in which this court considered article XI, section 18, mentioned only this "pay as you go" restriction[15] of the section, which it termed a "radical change" from previous conditions. This restriction is manifestly distinct from that portion of the section which establishes the percentage of voter approval requisite to authorize indebtedness in excess of current revenues.

It is also apparent that article XI, section 18 was intended to compel local legislative bodies to inform the public of projects necessitating long-term expenditures and to give to the people the ultimate power of approving or rejecting them. However, we have been unable to discover from the records of the Constitutional Convention or from contemporary judicial opinions, why a two-thirds vote requirement, rather

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[14]The provision is now contained in article IV, section 16.

[15]We refer to the following language of section 18: "No county, . . . shall incur any indebtedness or liability . . . *exceeding in any year the income and revenue provided for such year*, . . ." (Italics added.)

than that of a simple majority, was adopted.[16] It may have been seen as a method by which most long-term indebtedness could be entirely prevented. (See Starner, *op. cit. supra*, at p. 7.) It may have been designed to protect property owners from the unrestrained desires of the landless for

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[16]Much of the recorded debate concerns the necessity and advisability of placing a maximum limit on local indebtedness. Proposals to accomplish this were introduced and a limit was included in initial drafts of section 18. Discussion on the floor centered on whether this limit should be expressed (as it was in the drafts) in the form of a ratio of debt to assessed value of taxable property, what the optimal debt to property ratio would be, whether certain types of projects should be exempted because of their social value and, if so, which types. Ultimately, no maximum limit was adopted, reliance apparently being placed on the other curbs on the incurring of debt. (2 Debates and Proceedings of the Constitutional Convention, *supra*, pp. 1068-1071; 3 Debates and Proceedings of the Constitutional Convention, *supra*, pp. 1381-1383.)

Nor do our cases shed any light on the purpose intended to be achieved by the two-thirds vote requirement. Two of the earliest cases, San Francisco Gas Co. v. Brickwedel, *supra*, 62 Cal. 641 and McBean v. City of Fresno (1896) 112 Cal. 159, discuss only the "pay as you go" aspect of the constitutional provision. City of Redondo Beach v. Taxpayers, Property Owners, Etc., City of Redondo Beach (1960) 54 Cal.2d 126 does assign a purpose to the section as a whole but does not purport to explain the choice of a two-thirds majority: "The purpose . . . is to safeguard the general funds and property of a municipality from a situation whereby the holders of an issue of bonds could, at some time after the issuance thereof, force an unconsented-to increase in the taxes of, or foreclose on the general assets and property of the issuing public corporation . . . ." (54 Cal.2d at p. 131.) This statement does not indicate what the relation between this purpose and an extraordinary majority vote requirement is, or was intended to be. Finally, while City of Palm Springs v. Ringwald (1959) 52 Cal.2d 620, does address itself to that portion of section 18 which requires a referendum, the case states only that it "is designed to afford the people who are required to pay the cost of providing such objects of public convenience and welfare an opportunity to express their approval or disapproval of a long-term indebtedness." (52 Cal.2d at p. 627.) This is hardly a satisfactory explanation for the two-thirds requirement, since the assigned purpose would be served equally well by a mandatory referendum whose outcome is determined by a simple majority vote.

publicly financed projects. It may have reflected an unarticulated premise that only those proposals which could command such substantial consensus *should* be undertaken. It would be mere speculation on this record to designate one purpose as that for which the two-thirds figure was selected. There is, of course, no evidence indicating that the requirement was designed as a subterfuge for discriminating against the interests of racial, national or religious minorities. This, however, is by no means the end of our inquiry.

Nor do we consider this matter concluded by any of the cases from this and other jurisdictions to which respondents have referred us. While the cited cases rejected various attacks on state debt limitations, none has decided the question here presented.

Finally, we do not believe that, because an equal protection argument was not made by any of the parties in the cases upholding debt limitations, a challenge to article XI, section 18 on those grounds lacks merit today. It is not surprising that there was apparently no discussion of the possible conflict between a two-thirds vote requirement and the equal protection clause during the Constitutional Convention. Nor is it remarkable that the provision was not assailed on these grounds in the courts. The period in which section 18 was adopted was not greatly concerned about inequalities in the electoral process.[17] For example, even though the Fifteenth Amendment, forbidding denial or abridgement of the right to vote on racial grounds, had been ratified only eight years earlier, most of the delegates to the Constitutional Convention believed that Californians of Chinese ancestry should not be permitted to vote and only grudgingly limited the exclusion to "natives of China." (Gaylord, "History of the California Election Laws," West's Election Code, p. 41.) Much water has gone under the

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[17]Thirty years were still to elapse before the Seventeenth Amendment sanctioned popular election of United States Senators, and it would be forty years until the Nineteenth Amendment extended the franchise to women.

bridge since the 1870's and we may not resolve this problem by applying the standards of that era. (See, e.g., Brown v. Board of Education (1954) 347 U.S. 483, 492.) "Our understanding and conception of the rights guaranteed to the people by the 'stately admonitions' of the Fourteenth Amendment have deepened, and have resulted in a series of decisions, enriching the quality of our democracy, which certainly do not codify State's rights, governmental theories or conceptions of human liberties" as they existed in the Nineteenth Century. (Fn. omitted.) (Fortson v. Morris (1966) 385 U.S. 231, 247; Fortas, J. dissenting.) Our task is to decide whether "the challenged provision is compatible with the demands of equal protection as they apply in contemporary society." (Castro v. State of California (1970) 2 Cal.3d 223, 231.) This means, since "notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change" (Harper v. Virginia Bd. of Elections (1966) 383 U.S. 663, 669), that the constitutionality of article XI, section 18 must be determined not only in light of the need for and effect of the provision under present conditions, but also in light of the greatly expanded protection we have afforded to the right to vote.

More than any decade since that immediately following the Civil War, the 1960's were a time of struggle to transform America's ancient promise of political equality into a reality. Ten years ago many of our citizens were barred from the polls for reasons related to their race, economic status or national background. Others, because of extreme disparities in population among electoral districts, were denied equal representation in Congress, in state legislatures, and in units of local government. Much of this has been changed, some by federal legislation[18] and some by constitutional amendment.[19] But the significant and stirring

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[18]See, e.g., The Voting Rights Act of 1965, 42 U.S.C.A. section 1971, et seq.

[19]United States Constitution, Amendment XXIV.

reforms have been effectuated by the United States Supreme Court which has insisted that our political structures and practices, no matter how venerable their origin, comport with the Fourteenth Amendment.

The court has entered the "political thicket" (Colegrove v. Green (1946) 328 U.S. 549, 556) to enforce the equal protection clause in three principal contexts. The first such category is composed of cases involving state laws that exclude various groups from voting in all or in certain types of elections. The court has eliminated many of these barriers to the electoral process; it has invalidated residency requirements excluding servicemen,[20] qualifying examinations excluding racial minorities,[21] poll taxes, excluding the poor and indigent,[22] and property qualifications excluding the landless.[23] The effect of these, and of related decisions,[24] has been to expand sharply the number of persons entitled to participate actively in the election process. This court,

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[20]Carrington v. Rash (1965) 380 U.S. 89, held unconstitutional a Texas law which barred all servicemen who had moved to Texas during their military service from voting in any state election.

[21]United States v. Louisiana (1965) 380 U.S. 145, banned the employment of voter qualification examinations with such discretionary standards as to permit their use as deliberate devices for racially motivated exclusions.

[22]Harper v. Virginia Bd. of Elections, *supra*, 383 U.S. 663, invalidated state laws requiring the payment of poll taxes as a condition to voting in state elections.

[23]Kramer v. Union School District (1969) 395 U.S. 621, held that local school district elections could not, consistent with the equal protection clause, be limited to parents of school children, property owners and lessees of real property. Cipriano v. City of Houma (1969) 395 U.S. 701, struck down a Louisiana statute confining the right to vote in municipal utility revenue bond elections to property taxpayers.

[24]See, e.g., Katzenbach v. Morgan (1966) 384 U.S. 641, which upheld section 4(e) of the Voting Rights Act of 1965, invalidating state English literacy requirements as applied to certain foreign language literates.

for example, complying with principles established by the above line of cases, has limited the application of two voter qualification provisions contained in our state Constitution.[25]

The second major area in which the high court has intervened involves state geographical districting systems which dilute the effectiveness of the franchise either directly or through the allocation of legislative representation. In order to insure that voting power remains precisely correlated with population, the court has abolished electoral systems which weighted votes in elections for statewide office;[26] it has ordered that the districting of federal congressional seats[27] and the apportionment of both houses of state legislatures[28]

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[25]See Otsuka v. Hite (1966) 64 Cal.2d 596, holding that the exclusion of those convicted of "infamous crimes" (Cal. Const., art. II, § 1) could not extend to all felons; Castro v. State of California, *supra*, 2 Cal.3d 223, holding that the requirement of literacy in English could not be applied to citizens who are literate in Spanish.

[26]Gray v. Sanders (1963) 372 U.S. 368, held that Georgia's "county unit system" (somewhat analogous in operation to the federal electoral college) unconstitutionally diluted the weight of some votes on the basis of geographical location. *Gray* stands for the proposition that "once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . ." (372 U.S. at p. 379.)

[27]Wesberry v. Sanders (1963) 376 U.S. 1, extended the rule of population equality to congressional districting. An apportionment of congressional seats which "contracts the value of some votes and expands that of others" is unconstitutional, *Wesberry* held, since "the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote . . . ." (376 U.S. at p. 7.)

[28]Reynolds v. Sims (1964) 377 U.S. 533 applied the "one man, one vote" principle of *Gray* to state legislative apportionment. Every qualified resident, *Reynolds* held, has the right to a ballot for the election of state legislators of equal weight to the vote of every other resident and that right is infringed when legislators are elected from districts of substantially unequal population.

be conducted on the basis of substantial population equality among such units. Subsequent cases have insisted upon a rule of absolute equality of population[29] and have extended the principle of "one man, one vote" to various units of local government.[30] The result of these decisions has been to equalize the effectiveness of participation in the political process.[31]

The third category of which we speak is less neatly defined. In a general way, it deals with the extent to which a state, through the political process, may impose on the interests of one group burdens which are significantly more onerous than those it imposes on similar interests of other groups. In two cases decided last term, the high court struck down state and local laws placing unusual obstacles in the path of certain political and racial groups.[32]

In our view, these three groups of decisions fashion the doctrinal structure and delineate the basic principles that must govern our decision in the case at bench. Turning now to the issue before us, we conceive the broad question to be whether California, after having directed that certain matters of local governmental policy be submitted to the

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[29]Kirkpatrick v. Preisler (1969) 394 U.S. 526; Wells v. Rockefeller (1969) 394 U.S. 542.

[30]Avery v. Midland County (1968) 390 U.S. 474; Hadley v. Junior College District (1970) 397 U.S. 50 [25 L. Ed. 2d 45].

[31]California cases implementing the "one man, one vote" mandate include: Silver v. Reagan (1967) 67 Cal.2d 452; Wiltsie v. Board of Supervisors (1966) 65 Cal.2d 314; Miller v. Board of Supervisors (1965) 63 Cal.2d 343 and Silver v. Brown (1965) 63 Cal.2d 270.

[32]See Williams v. Rhodes, *supra*, 393 U.S. 23, holding unconstitutional under the equal protection clause Ohio election laws which imposed requirements to qualify for positions on the ballot giving a decided advantage to the established political parties; Hunter v. Erickson (1969) 393 U.S. 385, invalidating, on equal protection grounds, a city charter provision requiring that fair housing ordinances passed by the city council be submitted to the voters in a city-wide referendum.

people, may require the outcome to be determined by a decisional process other than that of a simple majority vote.[33]

Petitioners contend that it may not. Their position may be fairly summarized as follows: article XI, section 18, classifies voters on the basis of the manner in which they vote and, by requiring a two-thirds majority, patently discriminates against those who vote in favor of bond issue propositions. This dilution of voting power denies such voters equal protection of the laws, absent a showing that the provision is necessary to promote a compelling state interest. While economic conditions in the late Nineteenth Century may have justified such a provision, today it is no longer necessary to impair the right to vote in order to guarantee responsible municipal financial policies.

Respondents' position is more elaborate. First, respondents contend, for various reasons, that the equal protection clause has no application to this case. Second, assuming that the equal protection clause does apply, respondents urge, again for a variety of reasons, that we not adopt the stringent standard of review for which petitioners argue, but instead apply the traditional equal protection test and inquire merely whether the two-thirds vote requirement bears any rational relationship to a valid state purpose which, they

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[33]The question has been decided by the highest court of two states, West Virginia and Idaho. Lance v. Board of Education of County of Roane (W. Va. 1969) 170 S.E.2d 783 held that a 60 percent vote requirement for the issuance of local general obligation bonds contravened the equal protection clause. Bogert v. Kinzer (Idaho 1970) 465 P.2d 639, reached the opposite conclusion and upheld a provision of the state constitution requiring a two-thirds majority for the issuance of general obligation bonds. Neither opinion fully explains its conclusion nor why the United States Supreme Court voting rights and reapportionment cases are or are not apposite. Consequently, neither is of particular assistance to us. The United States Supreme Court on April 6, 1970, granted a writ of certiorari in Lance v. Board of Education of County of Roane, *supra*. (Docket No. 1244, Gordon v. Lance.)

maintain, it does. Finally, assuming that the stricter standard of judicial review is applied, respondents assert that the constitutional provision is necessary to achieve a compelling state interest. We shall take up each contention in turn.

I

Respondents argue that petitioners' reliance on the equal protection clause is misplaced; three reasons are advanced in support of this position.

First, it is contended that since the purpose of the equal protection clause is to regulate the manner in which our laws classify citizens, it can have no application here because article XI, section 18, draws no lines between groups and creates no classifications. We do not agree. It appears obvious to us that section 18 implicitly creates two classes of voters: those who favor a proposed bond issue and those who oppose it. It is not essential that a classification appear in explicit terms on the face of the law. Nor is it necessary that those who are allegedly disadvantaged by the classification either constitute a class which is "objectively identifiable" prior to the election or that they share in common other characteristics, such as race, economic status or residence. It is sufficient that the class emerge from its inchoate state at the time of the election and that it be defined by the act of voting affirmatively on a bond issue proposition. The equal protection clause extends to the shared political interests of groups otherwise random and diverse. (Williams v. Rhodes, *supra*, 393 U.S. 23; see also Carrington v. Rash, *supra*, 380 U.S. 89, 94: " 'Fencing out' from the franchise a sector of the population *because of the way it may vote* is constitutionally impermissible." (Italics added.)[34]

[34] Respondents point out that an individual may vote in favor of some bond propositions and against others at the same election. We fail to see the relevance of this observation; it certainly does not demonstrate that section 18 works no classifications. It should be apparent that the section does not classify on the basis of characteristics which will define a physically cohesive, unchanging group.

Next, we are advised that because section 18 deprives no one of his right to vote on bond propositions and because each vote is "fully counted," there is no discrimination, invidious or otherwise, against which the equal protection clause historically has been directed. It is always easier to assume away a problem than to resolve it. However, we think respondents' suggested assumption distorts reality. It does not require extended discussion to establish that the inevitable result of any extraordinary majority requirement is to give to one group of voters a greater influence on the outcome of an election than to another group of comparable size but opposite conviction. This is the functional equivalent of according to each person in the former group a vote of relatively greater weight precisely because of his position on the issue which is to be decided. In other words, a result identical to that produced by a two-thirds vote requirement could be achieved by requiring only a 50 percent affirmative vote for passage of bond issue propositions but providing that in tabulating the election results each negative vote would be multiplied by two while affirmative votes would be counted at face value. Alternatively, those citizens who opposed a measure could be permitted to vote twice while those who favored it were limited to only one ballot. The biased structure of both of these voting schemes is perhaps more obvious than the discrimination inherent in an extraordinary majority vote requirement. The effect of each, of course, is identical. "If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that the discrimination was

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Rather, its lines are drawn on the basis of each person's preference on specific bond propositions in particular elections. Accordingly, the class so defined will vary to some extent from issue to issue, election to the election. The fact remains, however, the each participant in the election must vote "yes" or "no" and section 18 classifies the voter on the basis of that expressed opinion. No more is required for the equal protection clause to apply.

allowable. [Citation.]" (Gray v. Sanders, *supra*, 372 U.S. 368, 379.)[35] Although the question of whether such discrimination is allowable has not been settled by the Fifteenth or the Nineteenth Amendment, we think it equally apparent that when a state weights the negative vote more heavily than the affirmative vote, no one can successfully contend that there is *no* discrimination.

Respondents, however, are unwilling to concede that article XI, section 18 (despite its creation of a classification with adverse consequences for those within it) constitutes governmental action to which the equal protection clause is applicable. They buttress this position primarily by the observation that there is no federal constitutional right in the people of a municipality or other local governmental entity to vote on such a matter as the incurring of bonded indebtedness. We do not understand petitioners to dispute this or to claim an inherent right to vote upon all issues concerning governmental expenditures. We emphatically reject, however, the inference, which respondents seek to draw from this initial premise, that voters have no right to equal protection in bond issue elections. To agree that there is no constitutionally granted right to vote on a particular issue is not to concede that such elections as may be

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[35] As stated by Justice Black, dissenting, in Colegrove v. Green, *supra*, 328 U.S. 549, 569-570: "No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote . . . . [T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast." See also the opinion of Justice Douglas, dissenting, in South v. Peters (1950) 339 U.S. 276, 279: "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have . . . the vote counted at full value without dilution or discount [citation] . . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted."

held are therefore beyond the restraints of the United States Constitution. We are aware of no principle which required the California Constitution to provide that certain issues of local finance were to be entrusted to the voters. (See In re Pfahler (1906) 150 Cal. 71, 79.) Since it has done so, however, the voting procedures established must comply with equal protection. "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." (Harper v. Virginia Bd. of Elections, *supra*, 383 U.S. at p. 665.)

Respondents also point out that there is no constitutional right to incur indebtedness. This may be correct; it is also wholly irrelevant since the requirements of due process and equal protection apply to governmental acts regardless of whether or not they affect rights specifically guaranteed by other constitutional provisions. (See, e.g., Griffin v. Illinois (1956) 351 U.S. 12; Weiman v. Updegraff (1952) 344 U.S. 183.)

II

We now turn to consider what should be our standard of review in evaluating the classification created by article XI, section 18.

As this court has previously noted,[36] the United States Supreme Court has tended to employ a two-level test in reviewing legislative classifications under the equal protection clause. In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. (See McDonald v. Board of Election (1969) 394 U.S. 802, 809; McGowan v. Maryland (1961) 366 U.S. 420, 425-426.)

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[36]Purdy & Fitzpatrick v. State of California (1969) 71 A.C. 587, 600.

On the other hand, in cases involving "suspect classifications"[37] or touching on "fundamental interests,"[38] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. (See Shapiro v. Thompson, *supra*, 394 U.S. 618, 638; Sherbert v. Verner (1963) 374 U.S. 398, 406; Skinner v. Oklahoma, *supra*, 316 U.S. 535, 541; see also *Developments in the Law - Equal Protection* (1969) 82 Harv. L. Rev. 1064, 1120-1131.) Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose. The dual aspect of this standard is clearly formulated in the opinion of Justice Marshall, dissenting, in Hall v. Beals (1969) 396 U.S. 45, 52: ". . . once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose. [Citations.]"

As the above quotation indicates the United States Supreme Court has included voting in the category of rights deemed "fundamental." Accordingly, state laws which permit or require differential treatment of those attempting to exercise this right have been "carefully and meticulously scrutinized" (Reynolds v. Sims, *supra*, 377 U.S. 533, 562) in order to determine whether the burdens imposed are "necessary to promote a compelling state interest." (Kramer v. Union School District, *supra*, 395 U.S. 621, 626-627; see

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[37]Certain classifications, such as those based on race (McLaughlin v. Florida (1964) 379 U.S. 184) or wealth (Douglas v. California (1963) 372 U.S. 353), are "highly suspect" (*McDonald, supra*, at p. 807).

[38]Interests which have been identified as fundamental and therefore deserving of special treatment under the equal protection clause include procreation (Skinner v. Oklahoma (1942) 316 U.S. 535) and interstate travel (Shapiro v. Thompson (1969) 394 U.S. 618).

also Cipriano v. City of Houma, *supra*, 395 U.S. 701; Castro v. State of California, *supra*, 2 Cal.3d 223; Otsuka v. Hite, *supra*, 64 Cal.2d 596, 602.)

Respondents, however, contend that the reapportionment and voting rights cases are not controlling and urge us to apply the more lenient standard, traditionally associated with review of fiscal and economic regulatory measures, in evaluating petitioners' equal protection claims. Two theories are advanced in support of this contention. Neither, we believe, has merit.

First, it is argued that the right to vote (which is termed a "political" right) is not involved in this case, and that the reapportionment and voting rights cases, which did concern this "political" right, are inapposite. We are told that a vote in a bond issue election is merely a "procedural" step in an "administrative" process of authorizing a particular form of indebtedness. This, in turn, is said to be only an "economic" matter. We do not believe it would be either sensible or responsible for our decision to turn on whether bond issue elections are characterized as "political" or "procedural and administrative."

Voting for or against a candidate for public office is obviously not precisely identical to voting for or against a ballot proposition authorizing a local legislative body to incur a specific indebtedness to finance a particular project. But neither is it wholly dissimilar. Respondents have suggested no reasons (other than their conclusionary definitional distinctions) for us to ignore the salient fact that what might be termed an "administrative" decision is made, in a bond election, by a political method closely resembling direct democracy. Nor have any reasons been presented which indicate less need for judicial scrutiny in the context of such elections. Indeed, so far as appears, all that underlies this argument is the inaccurate observation that the Supreme Court has articulated the higher equal protection standard only in cases involving elections for public office. However, as the court itself has indicated, it is the nature of the right

asserted, not the type of election, which is the critical determinant.[39]

In any event, the argument has been foreclosed by Cipriano v. City of Houma, *supra*, 395 U.S. 701. *Cipriano* concerned an election whose purpose was not to select among candidates for a public office, but, as in the case at hand, to determine whether or not a proposed local government bond issue should be approved.[40] The court perceived no distinction between the election in *Cipriano* and that in *Kramer*, which was an election to choose representatives on a policymaking body. Applying the identical standard, the court held that the exclusion of nonproperty owners violated equal protection because it had not been shown necessary to promote a compelling state interest. (395 U.S. at p. 706.)

We find respondents' second argument no more persuasive. Pointing out that, unlike *Harper*, *Kramer*, and *Cipriano*, this case does not involve an absolute denial of the

[39]In *Kramer*, *supra*, the court stated: "Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." (395 U.S. 621, 629.) And, in Hadley v. Junior College District, *supra*, 397 U.S. 50, 54 [25 L. Ed. 2d 45, 50], it held: "When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election."

[40]The election in *Cipriano* involved revenue bonds; those at issue here involve general obligation bonds. The parties have correctly ascribed no relevance to this distinction for the purpose of determining the applicable equal protection standard. The United States Supreme Court has just held that there is no significant difference between the two types of municipal security insofar as the constitutionality of excluding voters on property-ownership grounds is concerned. Applying the standards utilized in *Kramer* and *Cipriano*, the high court held that state laws which restrict to property taxpayers the vote in elections to approve proposed general obligation bonds violate the equal protection clause. (Phoenix v. Kolodziejski (1970) ___ U.S. ___; 38 U.S.L. Week 4596.)

franchise, respondents contend that under McDonald v. Board of Elections, *supra*, 394 U.S. 802, the traditional equal protection test should be applied. Respondents' reliance on *McDonald* is misplaced. As the court noted in *Kramer*, the right to vote was not at issue in *McDonald*, which involved merely a "claimed right to an absentee ballot." (395 U.S. at p. 627, fn.6.) We have found no decision of the United States Supreme Court intimating that states may restrict or infringe voting rights, upon a mere showing of some rational relationship to a valid purpose, so long as they stop short of outright denial. To the contrary, the language of the relevant decisions is deliberately broad and encompassing. For example, in *Harper, supra*, the court declared: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might *invade* or *restrain* them must be closely scrutinized and carefully confined. [Citations.]" (Italics added.) (383 U.S. at p. 670.) In Williams v. Rhodes, *supra*, 393 U.S. 23, discussing state laws which imposed "burdens" on the right to vote, the court stated: ". . . the decisions of this Court have consistently held that 'only a compelling state interest. . . .'" could justify them. (393 U.S. at p. 31.) In short, state laws denying or diluting the right to vote are tested by the same stern standard. (See *Kramer, supra*, stating this proposition and citing reapportionment and voter qualification cases interchangeably.)

We are, therefore, satisfied that article XI, section 18, of the California Constitution is valid under the equal protection clause of the Fourteenth Amendment if, and only if, it can be shown necessary to promote a compelling state interest.[41]

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[41] Rimarcik v. Johansen (D. Minn. 1970) 310 F.Supp. 61 supports our conclusion. In that case a three-judge federal district court struck down as violative of the equal protection clause a Minnesota statute requiring 55 percent voter approval to adopt or amend city charter provisions governing liquor control laws. While recognizing that the

III

A.

Primarily, respondents justify the two-thirds vote requirement as a protective device necessary to insure "municipal solvency," promote "fiscal responsibility," and forestall "ill-advised and excessive indebtedness."[42] Stripped of rhetoric, their contention is that it is *necessary* to permit a minority to hold veto power over proposed bond issues approved by a majority of the local legislative body and a majority of their fellow citizens in order to prevent such bonded indebtedness from reaching levels that would necessitate either foreclosure or repudiation. Respondents imply that the two-thirds vote requirement is all that stands between the state and either immediate financial catastro-

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reapportionment cases were factually distinguishable, the court thought the principle they vindicated—the right of a citizen to have his vote given equal weight to those of other voters—was applicable. The court applied the standard articulated in *Kramer*, which it considered controlling in all cases of denial or dilution of voting rights, and held the 55 percent vote requirement unconstitutional since it gave to those opposed to change in liquor laws a disproportionate voice in the outcome without a showing that this was necessary to promote a compelling state interest.

[42]There appear to be two causes for the unusual vagueness with which these goals are described. The first is the scarcity of informative documentary evidence as to the intention of those who drafted and adopted the two-thirds requirement. (See pp. 14-15, *ante*.) To the extent this is the cause, the lack of specificity is unavoidable. The second cause appears to be a confusion between the general principle of debt control and the particular technique of an extraordinary majority vote requirement. We emphasize that the propriety of state imposed restrictions on local debt formation is not in issue. What is in issue is the legality of the two-thirds requirement and it is the connection between *this device* and municipal solvency which must be demonstrated.

phe[43] or ultimate collapse of its political subdivisions under crushing burdens of debt foolishly incurred by reckless or malevolent popular majorities. There is no support for respondents' position. On the other hand, we find persuasive petitioners' argument that it is no longer necessary to restrict citizens' voting rights in order to protect society from the financially irresponsible accumulation of bonded indebtness by local governments.

First, critics have characterized the two-thirds requirement as a "crude mechanical response to improvident overextension of public debt in the fiscally unsophisticated period of the latter Nineteenth Century." (See Cal. Const. Revision Com., *supra*, p. 370.) Petitioners point out that virtually every factor which may have been relevant during the chaotic period of its enactment has since been altered dramatically. One of the most significant changes is the "great improvement in the quality and integrity of governmental and financial administration. The existence of more responsible and responsive local legislative bodies, the development of a corps of professional administrators and finance officers, improvements in the management of local affairs, and the development and refinement of standards, procedures and techniques for financial administration—these are all important reasons why today's local governments are not likely to spend themselves into bankruptcy or to refuse to pay their debts." (Marini, Local Bond Elections in California: The Two-Thirds Majority Requirement (Univ. of Cal. Institute of Governmental Studies, 1963) p. 4.)

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[43]To the extent that respondents have specified their fears in this regard, we believe them to be unrealistic. If, as respondents assert, many presently authorized bonds cannot be sold because of the currently high market interest rates, we do not see how an increase in bond issue election successes as a result of a lower vote requirement could have seriously harmful consequences. The only effect would appear to be an increase in the amount of authorized but unsold bonds. In any event, we do not believe that current market conditions can justify the indefinite continuation of a device which so severely impairs the right to vote.

The institutions of the private sector have undergone a similar evolution. The bond market was a shambles when section 18 was written; now its well ordered operations discourage unsound bond offerings. "Numerous modern procedures of fiscal administration have been developed since 1879. A host of auditing and financial accounting requirements have been written into law. [See, e.g., Ed. Code, §§ 17199, 17206.] The bond market itself is subject to safeguards precluding most of the practices that the 1879 constitutional provision was probably intended to correct. For example, greatly improved reporting procedures are now in effect, assuring that full and accurate information on the financial and legal ramifications of individual bond issues is supplied to prospective buyers.[44] Highly qualified bond consulting firms, specialized legal counsel and careful bond issue evaluation by respected national rating agencies, have all built strong public confidence in most local bond offerings. The sense of security appears to be general, and is not limited to states requiring an extraordinary majority vote. This fact, in itself, strongly suggests that the many institutional and procedural improvements outlined here—and not the two-thirds requirement— are responsible for the soundness of modern local capital outlay finance." (Scott and Hamilton, *op. cit. supra*, at p. 2.)[45]

Second, other provisions of article XI, section 18, itself serve to moderate any tendency to incur debt beyond th

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[44]Bonds which might jeopardize a community's financial stability would be unlikely to find a purchaser. Municipal bonds are valued by investors not because of their speculative possibilities but because of their great security and the favorable federal tax treatment accorded them under 26 U.S.C.A. section 103. In addition, bond purchasers are unusually sophisticated; in 1964 over 60 percent of all bondholders were institutional investors such as commercial banks and insurance companies. (Investment Bankers Association of America, Fundamentals of Municipal Bonds (4th ed. 1965) p. 21.)

[45]See also United States Advisory Commission on Intergovernmental Relations, A Commission Report: State Constitutional and Statutory Restrictions on Local Government Debt (1961) at p. 22.

capacity of the issuing entity to service or beyond its capacity to service without curtailing essential governmental functions. Each general obligation bond issue is required to contain a provision "for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due" and also "to constitute a sinking fund for the payment of the principle thereof. . . ." (Cal. Const., art. XI, § 18.)[46] It is this tax, the total amount of the bond issue, and the purpose for which the bonds are issued and on which their proceeds are to be expended, which are submitted to the electorate. The requirement of an election itself may act as a deterrent to unnecessary borrowing, since the effort and expense entailed make it unlikely to be undertaken without serious thought and preparation. More important, the electoral mechanism permits open debate and discussion of the merits of each bond proposal by the residents of the local community. We consider it fanciful to argue, in the absence of any evidence, that a majority of this electorate, better educated and with access to far more sources of information than its counterpart of a century ago,[47] is so incapable of

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[46]In City of Redondo Beach v. Taxpayers, Property Owners, Etc., City of Redondo Beach, *supra*, 54 Cal.2d 126, we indicated that the purpose of requiring contemporaneous authorization of the necessary tax increment was to "safeguard the general funds and property of a municipality from a situation whereby the holders of an issue of bonds could, . . . force an unconsented-to increase in the taxes, or foreclose on the general assets and property of the issuing public corporation to obtain payment . . . ." (54 Cal.2d at p. 131.) It is obvious that a simple majority vote could authorize this tax quite as effectively as a two-thirds majority. Since this is so, the extraordinary majority requirement may not be justified on the ground it protects real property (and its owners) from the risks just described.

[47]Several provisions of our election laws seek to provide an accurate description of bond propositions and to insure that the voter has access to the viewpoints of both proponents and opponents. Thus, an analysis of the proposition made by public counsel (Elec. Code, §3781) and a statement as to its tax cost (Elec. Code, § 5300 et seq.) are mailed to all voters. Opportunity is available for both favoring and opposing views to be included in ballot arguments and distributed to voters without cost. (Ed. Code, § 1460 et seq.; Elec. Code, §§ 3782, 3783, 5010 et seq.)

mature judgment that it will bankrupt itself through indiscriminate borrowing.

Nor is there any evidence that California's two-thirds requirement (which is among the most restrictive in the nation),[48] has produced greater fiscal security than may be achieved with a simple majority vote requirement. Although most states do not require a two-thirds vote, we have been referred to no data indicating more frequent bond defaults, lower credit ratings, or extravagant public projects in those states. As we have previously noted, since 1849 the State of California has been permitted to borrow in excess of its debt limit with the approval of 50 percent of those voting on a particular bond issue. (Cal. Const., art. XVI, § 1.) Yet, State of California general obligation bonds are rated as high-grade bonds by the major investment advisory services. The judgment of the market place does not support respondents' argument.[49] Indeed, the credit rating of a community may well be eventually impaired if, as a result of inability to secure a two-thirds consensus, necessary projects are deferred and the quality of life deteriorates.

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[48]Most states require some form of mandatory referendum as a condition precedent to incurring of local debt (Starner, *op. cit. supra*, p. 7). However, requirements vary, especially with regard to the majority required to approve a bond issue. By far the most common provision is for a simple majority. Only four states (California, Idaho, Kentucky and Missouri) require two-thirds as a general rule. (Cal. Const. Revision Com., *op. cit. supra*, at p. 372. Note, *Judicial Activism and Municipal Bonds* (1970) 56 Va. L. Rev. 295, 331-334.)

[49]A recent handbook published by the Investment Bankers Association of America, Fundamentals of Municipal Bonds (see fn. 44, *ante*) devotes a chapter to analyzing the credit of issuing municipalities. Factors ranging from the community's past attitude toward debt and the character of its officials, to its tax structure and the relationship of its current debt service requirements to its annual revenues are discussed. *No* reference is made in the credit analysis to the factor of whether the bonds were approved by two-thirds or a simple majority of the voters.

Finally, there is impressive evidence that the two-thirds vote requirement has not so much limted total local government indebtedness as it has redirected borrowing into vehicles other than the general obligation bonds of regularly constituted political units. While the economic consequences of these alternate financing devices are substantially similiar to those of voted general obligation bonds, they are not required to receive a two-thirds majority vote and, in some instances, permit long-term borrowing over which the public has no direct control at all.[50]

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[50]Many ingenious organizational and financing arrangements have been devised to avoid the extraordinary majority barrier. For example, it is widely believed that the goal of avoiding the two-thirds vote requirement has stimulated formation of special districts which fall outside the scope of the constitutional provision. This, of course, simply increases the confusion and inefficiency which result from the artificial and complex structure of overlapping governmental units. (See Cal. Const. Revision Com., *supra*, pp. 367-368.) The principal financing devices which have been utilized to, in effect, incur long-term debt without securing a two-thirds vote are revenue bonds, various forms of lease-purchase financing, and joint powers authority bonds.

Revenue bonds are those which are dischargeable solely through revenues generated by the capital improvement system whose construction or enlargement they finance. They are not within the ambit of article XI, section 18 despite the fact that a pledge of the system's total revenues will diminish the financial resources of the entity that are available for general governmental expenditures, by reducing or eliminating operational revenues previously used for such purposes. However, their use is confined to the financing of projects which are income producing.

A second financing pattern which has developed is the lease of an improvement by a governmental entity from a public body that has constructed or purchased it. Initially, these lessor entities were separately managed public retirement systems which financed the improvement with retirement funds on hand. Subsequently, cities and counties wishing to construct nonvoted improvements would enter into leases with nonprofit corporations (which were often organized with the active encouragement of the lessee city or county). Such corporations were able to issue tax-exempt bonds without voter approval and apply the proceeds from the bond sales to the construction of the desired project. The project was then leased to the public entity,

This phenomenon has attracted the widespread, often critical, attention of legal and financial commentators.[51] Their consensus, which we accept, is that the diversion of local borrowing into novel, more costly financing methods which often entirely evade submission to elections, renders any claim that the two-thirds vote requirement insures sound fiscal policy and popular control of long-term borrowing highly dubious at best.[52]

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the nonprofit corporation pledging the lease rentals as security for its bonds.

Joint powers authority financing contemplates the formation of a separate and independent authority by joint action of two preexisting governmental units under the Joint Exercise of Powers Act. (Gov. Code, §6500 et seq.) The authority constructs the desired project with funds derived from the sale of its bonds, which do not need extraordinary majority voter approval. It then leases the improvement to one or more of the public entities which formed it, using the lease rentals to retire the bonds.

[51] Beebe, et al., *Joint Powers Authority Revenue Bonds, supra*, 41 So. Cal. L. Rev. 19, contains an excellent history of state debt control and efforts to circumvent it in California. California Constitution Revision Commission, *supra*, pp. 360-368, provides a thorough compilation of case authority upon which the various financing techniques utilized to avoid the two-thirds requirement have been based. See also Rogers, *Municipal Debt Restrictions and Lease Purchase Financing* (1963) 49 A.B.A.J. 49; United States Advisory Commission on Intergovernmental Relations, *op. cit. supra*, at pp. 34-35; Marini, *op. cit. supra*, at pp. 11-16.

[52] In an address to the Extraordinary Majority Conference held on February 28, 1970, at the School of Law, University of California at Davis, under the joint sponsorship of the law school and the Institute of Governmental Affairs, Alan K. Browne, senior vice president of the Bank of America stated: "This is an era, for better or worse, of creative public finance. Where the need exists, a way will be found to fund it. The question is not whether and in what amount public improvements will be made, but rather how—by voted bonds or jerry-built financing vehicles; and by whom—the states and their localities, or by artificial creatures of public governments in masquerade." The full text of Browne's remarks will be published in the transcribed proceedings of the Conference on the Extraordinary Majority Requirement by the Institute of Governmental Affairs.

We find nothing to support respondents' grim warnings of financial disaster in the absence of a two-thirds vote requirement. We must, therefore, conclude that that provision is not necessary to insure the solvency of our local governments.

B.

A variety of other interests are asserted to be served by the extraordinary majority vote requirement. It is claimed, for example, that the state should be allowed to insist, before permitting its political subdivisions to incur bonded debt, that "a strong popular and informed public sentiment be satisfied as to the priority, the wisdom, the financial ability of the community to absorb the cost, and the public interest [in] and necessity for the creation of indebtedness for the particular improvement." This public sentiment, it is contended, is not expressed in a majority vote; it is expressed in a two-thirds vote. We do not doubt that a two-thirds requirement is well suited to deter the forms of governmental action to which it applies, since it conditions such action on a degree of consensus unusual in our pluralistic society. This, however, merely emphasizes the impact and burden of section 18; it does not justify it.

It is explained that the necessity for this consensus stems from the nature of bonded indebtedness. We are told that long-term borrowing irrevocably commits the future revenues of a community and that such a drastic step should not be undertaken upon the will of a mere majority. However, many decisions of government at all levels are crucial and irreversible, yet this alone has never been thought a sufficient ground upon which to remove them from the democratic process. We are not persuaded that a decision to commit future tax revenues to the financing of projects whose scale and useful life make payment of their costs from current revenues impracticable or inequitable is so unique or so fraught with peril that it warrants this deprivation of voting rights.

We do not think respondents have demonstrated that bond-finance decisions are fundamentally different from many other political decisions made by a majority vote or by representatives elected by a majority vote. Even assuming, however, that respondents had done so we think their argument fails at another level. This justification for the extraordinary majority requirement rests on the premise that a decision to *undertake* a project such as the construction of schools and playgrounds is qualitatively different from a decision *not to* do so. This, in turn, is based on the assumption that spending money is a more serious matter than not spending it and, consequently, must be justified whereas frugality is self-justifying. A predisposition to thrift may serve a man well. It does not, however, justify governmental inertia, especially when government is faced with critical social problems demanding urgent and sometimes costly remedies. There is no presumption in favor of inaction, as the United States Supreme Court observed in Avery v. Midland County, *supra*, 390 U.S. 474, 484: "[W]e might point out that a decision not to exercise a function within [local government's] power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens . . . as an affirmative decision."

In sum, we do not believe that the nature of general obligation bond financing warrants diluting the votes of those who want action, in order to institutionalize a preference for the interests of those who want stasis. (Hunter v. Erickson, *supra*, 393 U.S. 385, 392-393.)[53]

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[53]See also Valtierra et al. v. The Housing Authority of San Jose et al. (N.D. 1970) ___ F. Supp. ___, 38 U.S.L. Week 2528, in which a three-judge federal district court held unconstitutional article XXXIV of the California Constitution. Relying on *Hunter*, the court held that the constitutional provision, which required that low-rent housing projects financed by government be approved by community residents in a mandatory referendum, violated the equal protection clause. On June 8, 1970, the United States Supreme Court noted probable jurisdiction. (38 U.S.L. Week 3485.) (Docket No. 1557, James v. Valtierra.)

Nor do we believe that the two-thirds requirement may be justified as a method of protecting real property owners from additional taxes necessary to service the higher level of bonded indebtedness which it is reasonable to assume would result were bonds to be issuable upon simple majority approval. We express no opinion as to whether or in what circumstances the state may structure its election laws to accommodate the financial interests of property owners. Assuming, arguendo, this to be a legitimate state interest, we do not believe that under contemporary conditions it is so compelling as to justify depriving petitioners of their right to a fully effective vote.

The argument that a two-thirds requirement is necessary to protect property owners rests on the following assumptions: (1) That the relationship between the level of bonded debt and the property tax rate is constantly proportional; (2) that bonded debt is voted by an electorate which, by and large, does not pay property taxes and is thus undeterred by the prospect of their increase; and (3) that maintenance of low property tax rate levels will invariably be in the best short and long-term interest of property owners. While possibly accurate in the 1870's, none of these assumptions has been shown to be valid today.

First, the close link between general obligation indebtedness and property taxes, characteristic of the Nineteenth and early Twentieth Century, no longer exists.[54] Not only has the percentage of municipal revenues generated by the

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[54]Marini, *op. cit. supra*, at p. 6. Thus, while bonded indebtedness of all California cities has risen from $790,725,000 in 1954-1955 to $1,994,781,860 in 1966-1967 (California Controller, Annual Report of Financial Transactions Concerning California Cities (1966-1967) p. XI), the average city property tax rate has remained stable, increasing only from $1.83 (per $100 assessed valuation) in 1957-1958 to $1.84 (per $100 assessed valuation) in 1966-1967. (*Id.* at p. III.) Respondents are officials of a combined city and county whose consolidated tax rate is, of course, higher. (See fn. 2, *ante*.)

property tax declined sharply,[55] but in practice, many general obligation bonds have been redeemed through revenues derived from sources, such as excise taxes and enterprise activities, other than the property tax.[56]

Second, the information available to us does not warrant a characterization of property owners as a beleaguered minority which would be forced to shoulder the total cost of bond-financed projects. There are indications that a substantial majority of the registered voters in California own their own homes.[57] In addition, it is important to recognize that those who do not own real property nevertheless pay property taxes indirectly. Rental payments of lessees of taxable real property are to a material extent a function of the property tax.[58] Those few who neither own nor rent taxable property must still purchase goods and services from commercial enterprises that do and which, to some extent at least, incorporate that tax in the prices charged consumers.[59]

Thus, the factual predicates of respondents' contention do not exist. The probability of a property-owning minority being subjected to confiscatory taxation by the unbridled appetities of the property less masses is no more than

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[55]In 1912 the property tax accounted for 82 percent of the revenue of California cities; in 1960 it accounted for only 40 percent (Marini, *op. cit. supra*, at pp. 5-6.) In 1966-1967 this had declined further to only 34 percent (California Controller, *op. cit. supra*, at p. VII).

[56]California Controller, *op. cit. supra*, at p. XI.

[57]Marini, *op. cit. supra*, at p. 6, fn. 4.

[58]*Id.*, at pp. 6-7; Scott and Hamilton, *op. cit. supra*, at p. 3.

[59]In addition, these citizens directly pay a variety of local excise taxes which are available for commitment to debt service. (Cal. Const. Revision Com., *op. cit. supra*, at p. 375.) Of course, all citizens, whether or not they own property, share a subjective interest in and are affected by the developmental policies of their community and the projects for which bond financing is sought.

"theoretically imaginable."[60] (Mine Workers v. Illinois Bar Assn. (1967) 389 U.S. 217, 224.) No such remote dangers can justify the "immediate and crippling impact" (Williams v. Rhodes, *supra*, 393 U.S. 23, 33) on the rights of all citizens (property owners or not) who favor certain proposed governmental action, to receive equal protection of the law.

Finally, respondents advance the argument that the compulsory referendum of section 18 stimulates development of a more enlightened citizenry and provides local residents with direct control over their government. This may well be true. It is, however, a purpose equally well served by a referendum whose outcome is determined by simple majority will. There is no causal relationship (much less a necessary one) between the benefits of "participatory democracy" and extraordinary majority vote requirements.

We conclude, therefore, that the two-thirds vote requirement is not necessary to the attainment of any compelling state interest.

IV

We are unimpressed with respondents' remaining justifications proffered for the extraordinary majority requirement. Initially we find no significance in the fact that the two-thirds requirement of article XI, section 18, may be eliminated or modified by a simple majority of the voters in the state through a constitutional amendment. (See Cal. Const., art. IV, § 22; Cal. Const., art. XVIII, § 1.) Our conclusion in this regard is squarely required by Lucas v. Colorado

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[60]It is by no means obvious that a two-thirds vote requirement would be constitutionally permissible even were this a more realistic possibility. Underlying respondents' argument is a normative assumption that, for each individual, the benefits derived from governmental action should correspond to the burdens imposed by the taxing system; i.e., that those who use public facilities should pay for them. This assumption has never been though to describe our actual tax structure which is based, instead, on an "ability to pay" theory.

Gen. Assembly (1964) 377 U.S. 713. The high court there held that the existence of a political remedy such as the initiative or referendum, while possibly justifying a court's decision to tamporarily defer action, is of no constitutional significance. "Courts sit to adjudicate controversies involving alleged denials of constitutional rights . . . [I]ndividual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief . . . which the individual voters seek, might be achieved." (377 U.S. 713, 736.)[61]

Nor is our conclusion altered by the fact that a proposed constitutional amendment to article XI, section 18 (Proposition 4), designed to reduce the required voter majority to 60 percent for school and library bond issues submitted to the voters at statewide primary or general elections, was defeated in November 1966. At the outset, we must observe that the proposed amendment might well have failed to command the support of many voters who opposed the two-thirds requirement yet found certain elements of Proposition 4 unacceptable.[62] Thus, respondents' suggestion that the people of California have made a definite choice between two sharply contrasting alternatives and have indicated that they prefer, as a general rule, a minority veto

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[61]In addition, the fact that a majority of the voters of the State of California may have a practicably available political remedy does not mean that petitioners or the voters of San Francisco (who represent only a small minority of the voters in the state) have one.

[62]The text of Proposition 4 as well as the arguments for and against the measure are reprinted in Beebe, *op. cit. supra*, at pp. 29-30, fn. 38. It is apparent from an examination of these materials that voters who would have supported a total elimination of extraordinary majority requirements for bond elections may have considered Proposition 4 a piecemeal, halfway reform measure and withheld their support on that ground. Other may have opposed the amendment because they could see no reason for singling out library bonds for preferential treatment. Still others may have felt that the consequences of the amendment's limitation of a reduced voter requirement to issues submitted at statewide elections would be undesirable.

power over local general obligation bond issue propositions is not factually supportable.

More fundamentally, popular approval of electoral systems which infringe an individual's constitutionally protected right to cast an equally weighted vote is irrelevant. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. [Fn. omitted.]" (Lucas v. Colorado Gen. Assembly, *supra*, 377 U.S. 713, 736-737; Jordan v. Silver (1965) 381 U.S. 415 (concurring opinion).)[63]

We find no merit in the theoretical argument that there has been no violation of the equal protection clause because the elections here in issue represent an exercise of the legislative power retained by the people rather than of that delegated to the state Legislature. To describe in conceptual terms the origin of the power exercised at bond elections

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[63] "'The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restraint we can not, true to our oath, uphold such legislation in the face of palpable infringement of rights. Thus, state racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet no one would argue that this factor could compensate for manifest inequality. It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority. The rights which are here asserted are the rights of the individual plaintiffs to have their votes counted equally with those of other voters . . . . [T]o say that a majority of the voters today indicate a desire to be governed by a minority, is to avoid the issue which this court is asked to resolve. It is no answer to say that the approval of the polling place necessarily evidences a rational plan. The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice.'" (Lisco v. Love (1963) 219 F. Supp. 922, 944 (dissenting opinion); quoted in Lucas v. Colorado Gen. Assumbly, *supra*, 377 U.S. 713, 737, fn. 30.)

does not answer the question before us, which is to determine the restraints imposed on that power by the equal protection clause. The United States Supreme Court, however, has conclusively answered this argument: "[I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment." (Hunter v. Erickson, *supra*, 393 U.S. 385, 392.)

Respondents press a final argument upon us. They point out that the extraordinary majority requirement of article XI, section 18, is not unique and that there are many contexts in which governmental action is conditioned upon the ability of its proponents to secure the support of more than a bare majority. They observe that unqualified majoritarianism has not been the model for many of our institutions and that we have often afforded minorities power to preserve the status quo. They confront us with provisions of our federal and state constitutions which sanction deviations from simple majority rule.[64] They then admonish us that,

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[64]Respondents include in their compilation the following extraordinary majority provisions:

A) United States Constitution: article 1, section 3 (conviction in an impeachment proceeding); article 1, section 5 (expulsion from Congress); article 1, section 7 (overriding of an executive veto); article II, section 2 (ratification of treaties); and article V (constitutional amendment process).

B) California Constitution: article IV, section 8(a) (elimination of thirty-day waiting period before consideration of bill); article IV, section 8(d) (passage of emergency legislation); article IV, section 10(a) (override of executive veto of general bills); article IV, section 10(b) (override of executive reduction of appropriations bill); article IV, section 12(d) (appropriations from the general fund); article XI, section 7½ (surrender and annulment of county charter); article XI, section 2 (removal of county seat); article XII, section 22 (removal from office of Public Utilities Commission member); article XIII, section 14-4/5(i) (change in rate of taxation on insurance companies); article XIII, section 16.3 (imposition of tax on banks); article XIII, section 14 (classi-

since the two-thirds requirement cannot be distinguished from any of these provisions, a decision invalidating it will inevitably undermine the constitutionality of all. We cannot agree.

First, there is no merit to the attempt to analogize section 18 to institutional arrangements of varied historical origin and specialized function, such as the electoral college, the allocation of two senate seats to each state regardless of population, or the unanimous jury verdict required for a criminal conviction. Efforts to justify state-imposed inequalities in voting power through reliance on analogies to other distinct institutions have met with no success in the United States Supreme Court. For example, in Gray v. Sanders, *supra*, 372 U.S. 368, 378, the court declared: "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historic concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State . . . ." (Fns. omitted.) In Reynolds v. Sims, *supra*, 377 U.S. 533, 573, the court observed that: "Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements." Our reaction to analogies to, for example, the treaty ratification procedure in the United States Senate is not dissimilar.

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fication of personal property for taxation and assessment purposes); article XVI, section 1 (submission of state bond issue to voters); article XVIII, section 1 (submission of proposed constitutional amendment to voters).

An indication of the varied contexts in which extraordinary majority vote requirements are found is contained in Comment, *Extraordinary Majority Voting Requirements* (1969) 58 Geo. L.J. 411, 412-413, fns. 10-15.

Second, many of the extraordinary majority provisions to which we are referred are readily distinguishable in that, since they apply solely to the internal procedures of legislative bodies, they involve no dilution of the individual exercise of the franchise which is in issue here. Some, such as the two-thirds required for conviction of impeachment (U.S. Const., art. I, § 3) or expulsion from Congress (U.S. Const., art. I, § 5) are designed to avoid precipitate action in areas of particular importance or sensitivity. Others, such as the two-thirds required to override a presidential (U.S. Const., art. I, § 7) or gubernatorial (Cal. Const., art. IV, § 10(a)) veto or the two-thirds required to ratify a treaty (U.S. Const., art. II, § 2) represent those basic allocations of power between branches of government which are at the heart of that great system of "checks and balances" established by the founding fathers. In neither case is there any infringement of the individual citizen's right to vote such as that effected by section 18.

Finally, those extraordinary majority vote requirements which do apply outside the legislative process are by no means uniformly invalidated by our decision today. We emphasize that while it has not been demonstrated that a two-thirds vote requirement for approval of local general obligation bonds is necessary to promote a compelling state interest, similar provisions in other contexts may meet this standard. For example, it is common to insist upon a broad consensus before altering basic political documents. (See, e.g., U.S. Const., art. V.) Documents such as constitutions exist partly to provide continuity and stability to the affairs of state. This is a goal of fundamental importance and one which can be achieved only by protecting such charters from the will of temporary majorities. We see no *a priori* reason to assume that other extraordinary majority provisions cannot be shown to be necessary to attain "compelling" ends. Each must be judged on its particular facts. Those which serve no such end will fall, but our decision today commits us to no wholesale elimination of such laws. We, of course, express no opinion as to the validity of any of the foregoing provisions.

For the reasons already set forth, we hold that insofar as article XI, section 18, of the California Constitution requires the assent of more than a simple majority to authorize the incurring of certain indebtedness by local governmental entities it violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.[65] Since the requirement of a two-thirds vote is entirely distinct and severable from the other provisions of the section, section 18 remains, in all other respects, valid and operative.

We turn now to the issue of affirmative relief. Although employing somewhat different language, petitioners in both S.F. 22706 and S.F. 22707 seek substantially the same relief. Both pray for a peremptory writ of mandate directed to respondents and commanding, generally, that Propositions "A" and "B" be certified as having been duly approved by the voters of San Francisco and that all the usual ministerial steps be taken in order to prepare the bonds for sale.

Respondents, in their return to the alternative writ, contend that, even assuming the two-thirds requirement of section 18 to be unconstitutional, the relief which petitioners request is improper. Respondents assert that, because of the procedures actually followed by the City and County of San Francisco, they have no present duties of a ministerial nature to perform in connection with either bond proposition which have not already been performed.

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[65]Our decision herein extends, of course, to all statutory provisions which implement the constitutional directive. We thus declare unconstitutional those portions of Government Code section 43614 and Education Code section 21754 which incorporate the two-thirds vote requirement in their direction of procedural steps to be followed in the issuance of, respectively, municipal and school district bonds. On the other hand, we need not deal directly with the relevant sections of the Charter of the City and County of San Francisco, since they will automatically correspond to the effect of our decision on article XI, section 18.

We need not decide this question since we have determined that our decision today regarding the constitutionality of article XI, section 18 shall have prospective effect only and that accordingly no peremptory writs should issue.

It is now beyond dispute that the United States Constitution permits state appellate courts to restrict the application of a newly announced rule of law to future cases. (England v. Medical Examiners (1964) 375 U.S. 411, 422; Gt. Northern Ry. v. Sunburst Co. (1932) 287 U.S. 358, 364-366. See also the historical discussion in Linkletter v. Walker (1965) 381 U.S. 618, 622-629.) "State courts have generally found state constitutions equally permissive and have frequently stated that the decision whether to apply an overruling decision retroactively or prospectively only turns on considerations of fairness and public policy. [Citations.]" (Forster Shipbldg. Co. v. County of L.A. (1960) 54 Cal. 2d 450, 459.) This is the rule we have adopted in California (Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal. 2d 850, 868; County of Los Angeles v. Faus (1957) 48 Cal. 2d 672, 681) even though we have recognized that the purely prospective operation of a decision "temporarily preserves and applies a mistaken interpretation of the [state] Constitution. [Citation.]" (Forster Shipbldg. Co. v. County of L.A., *supra,* 54 Cal. 2d at p. 459.)

In recent years a substantial number of general obligation bond propositions have won the approval of a majority but less than two-thirds of the voters. (Scott and Hamilton, *op. cit. supra,* at pp. 3-5; Cal. Teachers' Assn., Research Bull. No. 228 (Oct. 1968), Results of Tax and Bond Elections in California School Districts 1967-1968, pp. 13-25; Cal. Teachers' Assn., Research Bull. No. 235 (Sept. 1969), Results of Tax and Bond Elections in California School Districts 1968-1969, pp. 17-32.) These bonds share the precise status of those for which Propositions "A" and "B" sought voter authorization. Thus, to declare that the bonds before us were authorized by the voters and to order that

they be prepared for sale would logically commit us to the validation of hundreds of millions of dollars in bonded indebtedness voted upon at now-forgotten elections. Such a course might well impose severe and unforeseen hardships upon many Californians who, quite reasonably, have made significant personal, financial, and civic decisions in reliance upon the apparently settled declaration of election results. Additionally, since times and priorities change, were these same bond propositions resubmitted to the voters today, many might fail to secure even a majority vote. In such circumstances, we consider it fairer and wiser that only prospective effect be given to our decision and that its rule be applied only to elections held after the date upon which this decision becomes final in this court.

This course will settle immediately the status of bond propositions on a uniform, statewide basis. It will permit local governments to propose to the electorate new bond issues, drawn to meet present community needs and to conform to present economic conditions. It will also allow voters to conduct campaigns and cast their ballots on bond propositions with full understanding, in advance, of the rules by which the outcome of the elections will be determined.

The force of these and similar considerations of public policy have impressed other courts. Thus, we find ample authority for our refusal to disturb the results of an election conducted under ground rules later held invalid (Allen v. State Board of Elections (1969) 393 U.S. 544, 571-572; Rimarcik v. Johansen, *supra*, 310 F.Supp. 61, 71; Jennes v. Little (N.D. Georgia 1969) 306 F.Supp. 925, 929; appeal dismissed 397 U.S. 94) and for our decision to limit the retroactive effect of judicial intervention in the bond election process. (Cipriano v. City of Houma, *supra*, 395 U.S. 701, 706; see also Douglass v. County of Pike (1879), 101 U.S. 677, 687; Gelpcke v. City of Dubuque (1863) 68 U.S. 175, 206.)

In each of the proceedings before us (S.F. 22706 and S.F. 22707), the alternative writ of mandate is discharged and the petition for a peremptory writ is denied.

SULLIVAN, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
TOBRINER, J.
SCHAUER, J.*

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

CONCURRING AND DISSENTING OPINION BY MOSK, J. TO OPINION BY SULLIVAN, J.

I concur in the court's conclusion that the two-thirds requirement for passage of bond issues is invalid, but I dissent from the majority's refusal to apply its decision to the litigants before the court.

The majority tell the parties who initiated these proceedings, who used their talents and resources to seek and obtain a hearing in this court, and who invoked the constitutional principles upon which we here rely, that they are undeniably right, their concept of the law is totally vindicated—but they lose, their petition for a peremptory writ denied. This is indeed a Pyrrhic victory, or as John Dryden wrote in the 17th century: "Even victor are by victories undone."

Few problems in both the criminal and civil fields have been fraught with more uncertainty than determination of the precise date on which newly discovered constitutional precepts become applicable. Justice Harlan referred to "the doctrinal confusion that has characterized our efforts" in this arena and the "many incompatible rules and inconsistent principles." (Desist v. United States (1969) 394 U.S. 244, 258 (dissenting opinion).) Legal scholars have been as hopelessly at odds over theories of retroactivity versus prospectivity. (See, e.g., Schaefer (1967) 42 N.Y.U.L. Rev. 631, as contrasted with Haddad (1969) 60 J. Crim. L. 417.)

The federal rule was originally settled, the Supreme Court adhering to the command of article III of the Constitution that it decide only existing controversies. "I know of no authority in this court to say," wrote Justice Holmes with typical grandeur, that decisions "shall make law only for the future." (Kuhn v. Fairmont Coal Co. (1910) 215 U.S. 349, 372 (dissenting opinion).) Two decades later in Great Northern Ry. v. Sunburst Oil & Refining Co. (1932) 287 U.S. 358, the legitimacy of the technique of prospective overruling was firmly established.

However, *Sunburst* made it clear that "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions . . . whenever injustice or hardship will thereby be averted." (*Id.* at p. 364.)

Thus three alternatives are available to a state court which has fashioned a new rule. It may apply the rule: (1) to acts occurring subsequent to the announcement only; (2) to acts occurring subsequent to the announcement and also to the present litigants; or (3) to acts occurring subsequent to the announcement, to the present litigants, and also to acts which occurred prior to the announcement. (Note (1962) 71 Yale L.J. 909, 933.) In the instant case the majority choose the first alternative. I prefer the second.

Only the most amorphous guidelines are available to determine which of the alternatives is appropriate in an individual case. Justice Cardozo referred to "considerations of convenience, of utility, and of the deepest sentiments of justice." (Cardozo, The Nature of the Judicial Process (1921) 146-149.) Justice Traynor spoke of "considerations of fairness and public policy." (Forster Shipbldg. Co. v. County of L.A. (1960) 54 Cal.2d 450, 459.) A federal court indicated "that retroactivity should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity." (Hanover Shoe Inc. v. United Shoe Machinery Corp. (3d Cir. 1967) 377 F.2d 776, 789.)

I am unimpressed by the "weighing of comparative benefits and evils," or the reasons–indeed, there is a paucity of reasons–given by the majority for denying to petitioners the fruits of their victory. The majority speak of bonds "voted upon at now-forgotten elections" (ditto, p. 62). In addition to being a gratuitous reflection upon the delays of

the judicial process—not markedly prolonged in this instance[1] —the simple fact is that these specific bond elections are not now-forgotten. They have been kept very much alive in current memory by this well-publicized litigation; both proponents and opponents at the election are eagerly awaiting the results of this lawsuit, and have undoubtedly made appropriate plans for the eventuality of a determination pro or con their position.

To invoke a prospective-only technique results in an arbitrariness toward individual litigants that is uncharacteristic of a court of justice. As Justice Harlan wrote in his dissent in *Desist*, it is a "truism that it is the task of this court, like that of any other, to do justice to each litigant on the merits of his own case."

The United States Supreme Court in Stovall v. Denno (1967) 388 U.S. 293, 301, suggested that someone, i.e., the litigants before the court, must be given the benefit of decisions which create new rights. The high court held: "We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact

that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Fns. omitted.)

Other authorities have advanced the theory that prospective overruling destroys incentive for appeal, and if it becomes a frequent policy, it will tend to deter counsel from presenting "issues involving renovation of unsound or outmoded legal doctrines." (Mishkin, Foreword, *The Supreme Court 1964 Term,* 79 Harv. L. Rev. 56, 61.)

A number of state courts have adopted substantial changes in the law and applied the new doctrine to the case at hand while otherwise giving it only prospective application. (See, e.g., Balts v. Balts (Minn. 1966) 142 N.W.2d 66, 75.) California adopted this procedure when it eliminated governmental immunity (Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211) and again when it imposed liability upon institutions financing tract developments. (Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal.2d 850.)

In short, the majority subvert an otherwise irrefutable opinion by denying equable application of its benefits. The aggrieved parties who knocked on our door are turned away with advice but without assistance. This, I believe, cannot be rationalized. One can only hope the petitioners find some solace in their service pro bono publico.

I would issue the peremptory writ.

Mr. Justice Peters has authorized me to say that he, too, would issue the writ.

MOSK, J.